



Connecticut Fund
for the Environment
Save the Sound®



CONNECTICUT LEAGUE OF
CONSERVATION VOTERS



The Law Offices of

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**Testimony of Connecticut Fund for the Environment/Save the Sound, The Nature Conservancy Connecticut Chapter, Keith R. Ainsworth, Esq., Connecticut League of Conservation Voters, Rivers Alliance of Connecticut, and Audubon Connecticut
Before the Commerce and Environment Committees**

***In support, with modifications to, Senate Bill No. 281
AN ACT CONCERNING VARIOUS REVISIONS
TO THE PROPERTY TRANSFER LAW***

***and in support, with modifications to, Senate Bill No. 293
AN ACT ESTABLISHING A RELEASE-BASED
PROPERTY REMEDIATION PROGRAM***

March 4, 2020

Dear Co-Chairs Hartley, Simmons, Cohen, and Demicco, and members of the Commerce and Environment Committees:

On behalf of our respective organizations, we write to express our strong support for the transition to a release-based system of reporting and remediation of contaminated properties provided that there are sufficient measures to ensure compliance and accountability over privatized cleanups. Most importantly, there must be a robust system of reporting and auditing, similar to the Massachusetts model, along with transparency and public access to this information.

We recognize that the current proposal is part of an ongoing process. DEEP and stakeholders continue to actively shape this system. Further, it should be noted that there was no opportunity

for environmental public interest base participation in the Transfer Act Working Group, therefore we appreciate that our voices may be heard during the current process.

In general, we support the establishment of a release-based program that will replace the Transfer Act. While the Transfer Act created an important system of liability for the cleanup of contaminated properties, it has not lived up to its intended potential from both an economic development and environmental cleanup perspective. Furthermore, Connecticut is currently the only state in the country that does not have a release-based system and relies solely on transfer-based triggers for remediation at the state level. If Connecticut switches to a release-based system, it will align itself with the rest of the country.

Moreover, transitioning to a release-based program will bring more contamination under Connecticut's jurisdiction. The Transfer Act has enabled property owners to evade cleanup obligations by simply avoiding the transfer of ownership. Consequently, contamination is often left in place where it further pollutes the environment. This results in significant environmental justice concerns, with industrialized sites most often sited in disadvantaged communities, which are then left with barriers to economic development and legacies of contamination. A release-based program would close this loophole by requiring that contamination instead be addressed when it occurs, resulting in more cleanups overall and cleanups immediately after a spill.

For these reasons, we support the establishment of a release-based program. However, the currently proposed legislation falls short in several areas. The current proposal includes a shift to more private oversight of environmental remediation: DEEP will not lead any cleanups, rather private licensed environmental professionals (LEPs) will lead all cleanups, even those most severe; and DEEP will only audit the cleanups of the most severe contamination. It should be noted that this shift is, in part, responsive to significant resource constraints of the agency and that only two other states, Massachusetts and New Jersey, have such a privatized system. In order to balance this shift, stronger avenues for review by DEEP and the public must be incorporated. In particular—to ensure adequate oversight and to protect public health and safety—we need:

- 1) A robust and transparent system of reporting and auditing;
- 2) Sufficient DEEP oversight through a specified percentage of cleanup audits;
- 3) Reservation of the right of DEEP to audit all tiers of cleanups or take over management of a cleanup when necessary; and
- 4) A citizen suit provision.

The Massachusetts structure, upon which DEEP has modelled this program, has all of these yet inexplicably reporting provisions and a citizen suit provision were excluded from the proposal. One cannot adopt the streamlining aspects of a release-based scheme without adopting the basic oversight functions. That would, of course, be a recipe for disaster.

Overall, we need more programmatic details laid out through legislation, rather than left to regulation. These key changes and other recommendations are detailed further below. By adopting the proposed legislation as modified by the changes outlined here, including

accountability mechanisms contained in the Massachusetts model, we can create a smooth transition to a more effective program that is better for the public, the environment, and businesses alike.

Comments on the Proposed Revisions to the Transfer Act Itself

First, we emphasize the obvious, that Connecticut cannot end the Transfer Act without a replacement program in place. The sunset clause to be added by section 1 of SB 281 must not be adopted unless the replacement release-based system is adopted as well. The Transfer Act amendments and the new release-based system must be taken together as one joint proposal that leaves no gaps in coverage during this period of transition.

Second, under section 1(3) of SB 281, we oppose changing the definition of “establishment” to include only the parcel on which a business operated. This proposal was developed by a working group that had zero participation by the environmental community. Neighboring parcels are often exposed to hazardous waste that spills and migrates across the land and through groundwater. Plumes of contamination do not obey manmade property lines. This rollback threatens to leave significant contamination undiscovered and unmitigated, continuing to harm the environment mere inches beyond the Transfer Act’s jurisdiction. Therefore, we oppose the proposed changes to the definition of “establishment.”

We acknowledge that the current transfer act has significant flaws. Rather than slowly repealing it, through a thousand cuts, however, we must move to a release-based system that will better protect the environment and environmental communities while promoting economic development.

Comments on the Proposed Release-Based System

As discussed above, we support the transition to a release-based system. However, the current proposal also shifts to privatized oversight of these cleanups, with limited involvement by DEEP. DEEP has proposed that the agency would not lead any cleanups, and only audit cleanups of the most severe contamination. Not all cleanups require reporting therefore they remain beyond the reach of public records review and any accountability whatsoever.

We are sympathetic to the resource constraints currently faced by DEEP, and the further constraints posed by upcoming 2022 retirements. We also understand that an effective LEP program can accelerate environmental remediation. At the same time, privatization without proper avenues for oversight by DEEP and the general public will be an environmental, ethical, and economic disaster. LEPs suffer built-in conflicts of interest that favor the needs of an employer over the environment. Perverse incentives exist to expedite cleanup and select the cheapest strategies in order to receive repeat business. Taken as a whole, LEPs are sincere and trustworthy professionals, but prevailing market forces threaten to create systemic slippage in priorities. Reporting obligations and agency audits can effectively combat these pressures by ensuring LEPs are beholden to not only private interests, but also to the public. Still, these mechanisms are only effective when robust enough to create a true deterrent.

One of the most effective available deterrents is transparency. However, transparency is notably lacking in the currently proposed release-based system. In fact, the proposal actively discourages transparency, stating “that certain releases may be remediated without being reported.” We strongly oppose a system in which private parties can withhold information regarding what would effectively be secret cleanups of contaminated properties. If cleanups are not reported, both DEEP and the public will lack the necessary knowledge to ensure that human health and the environment are being protected. Moreover, if cleanups are not reported, DEEP will lack knowledge as to whether cleanup projects adhere to the law.

The Massachusetts program has understood and addressed this concern by requiring reporting of all cleanups. To remedy this defect, the Connecticut scheme must maintain this part of the Massachusetts program and require reporting for all tiers and the filing of such reports on an online, publicly accessible database. With an effective e-governance system, the filing and management of reports is not a burdensome task. Only then will there be sufficient transparency for public confidence in this new release-based system.

State audits are another critical mechanism for deterring slippage in a new privatized system of cleanup oversight. While release-based systems are the national norm, privatization is certainly not. Only two other states have fully privatized the oversight function for contaminated site cleanups: New Jersey and Massachusetts. In Massachusetts, where they audit roughly 20% of cleanups, audits have failed to deter private slippage. When auditing its more substantial cleanups, Massachusetts finds problems requiring follow-up remedial work 70% of the time.¹ If a 20% audit rate leads to a 70% error rate, Connecticut must do better. DEEP is currently proposing that it only audit the most severe cleanups, while Massachusetts and New Jersey audit multiple tiers. Accordingly, we ask that Connecticut require at least 40% audits—by statute—to provide sufficient state oversight of this new private system. DEEP can prioritize such audits as it sees fit, but it must reserve the right to audit the records of any cleanup, regardless of its level of severity, and reserve the right to lead a cleanup. We expect these rights would only be exercised under extreme circumstances. By not even reserving these rights, DEEP is effectively abdicating its duties and leaving itself no remedy should an unforeseen worst case scenario arise.

Fundamental to the configuration of the proposed release-based system is the acknowledgement that DEEP has limited resources, which, in part, hinder the effectiveness of any environmental remediation law. This, paired with dramatic privatization, inherently signals that the general public can and must play a valuable role in filling in any gaps in oversight. Private remedies and citizen enforcement options will be foundational to the success of the new release-based system. We support the proposed legislation’s codification of a public nuisance action against creating or maintaining releases. However, we request that the new system also allow public enforcement for defective cleanups. Citizen suits are highly common enforcement mechanisms for the cleanup of contaminated sites. As of the early 2000’s, 21 states had some form of citizen suit

¹ Miriam Seifter, *Rent-a-Regulator: Design and Innovation in Privatized Governmental Decisionmaking*, 33 *ECOL. L.Q.* 1091, 1114 (2006). More recent reporting suggests this number may have slipped even further, with audits revealing problems 78% of the time. SIERRA CLUB NEW JERSEY CHAPTER, *Private Toxic Site Cleanup Goes Into Effect* (May 7, 2012), <https://www.sierraclub.org/new-jersey/press-releases/0297>.

authority in their cleanup statutes.² What is more, citizen enforcement can relieve pressure on the state, ensure a clean environment, and provide equity and justice. If parties are getting more latitude and flexibility due to increase use of LEPs, they must also maintain responsibility to the public and public health should they fall short in their obligations.

Cleanups under the release-based system will be tiered, and cleanup and reporting requirements will correspond to these distinctions. We encourage that sufficient guiding principles are included in statute and not be withheld for the regulations. We also encourage that legislation does not prematurely constrain the delineation of these tiers by setting a distinct number, such that certain cleanups are omitted from the tiering process. Cleanups under each tier should be reported to DEEP through an online, publicly accessible database, not just cleanups of the most severe contamination. Similarly, DEEP must reserve the right to audit cleanups under any tier, even if DEEP establishes a regular audit program for some subset of those tiers.

A final modification necessary for a successful release-based program is the establishment of strong remediation standards. In addressing this matter, the currently proposed legislation provides only one example of “remediation”: monitored natural attenuation. This specific enumeration of one solitary example may be misconstrued as a preference. Yet, monitored natural attenuation is often the least preferred method of remediation from an environmental perspective. Accordingly, revisions to the proposal should add other examples of remediation to signify there is no one preference. Alternatively, revisions could altogether eliminate the reference to any examples. Either way, it should be clear that remediation will be based on site-specific conditions with a preference for solutions that minimize harm to human health and the environment.

We support the transition to a release-based system provided that sufficient transparency and oversight is included to ensure compliance and protect public health and the environment as set forth above. We look forward to further discussions with DEEP, the Commerce and Environment Committees, and other stakeholders.

Respectfully submitted,

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² ENVTL. L. INST., AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, 2001 UPDATE 54 (2002).

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