



Connecticut Business & Industry Association

**TESTIMONY OF ERIC J. BROWN
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BEFORE THE
ENVIRONMENT COMMITTEE
FEBRUARY 22, 2010**

Good morning. My name is Eric Brown and I am associate counsel with the Connecticut Business and Industry Association (CBIA). CBIA represents thousands of businesses of all sizes throughout Connecticut that provide hundreds of thousands of Connecticut citizens with good jobs and good benefits.

CBIA appreciates the efforts of this committee and the legislature to focus its attention this session on bills that will have a positive impact on jobs.

CBIA's Annual Public Policy survey of our members released last month shows 68% of respondents, if they were to expand or relocate their business, would do so outside of Connecticut. Taxes and regulatory costs are key factors that businesses perennially say discourage their investment and growth within our state.

Clearly our state's ability to create jobs and achieve economic prosperity are related, in part, to our having a regulatory climate that achieves policy goals in a manner that does not unreasonably burden either the state or our businesses – both small and large.

CBIA greatly appreciates the Environment Committee including 3 bills on today's public hearing agenda that will help improve Connecticut's regulatory climate while continuing to affect environmental improvements in our state.

Specifically, CBIA strongly supports:

S.B. No. 120 (RAISED) AN ACT AUTHORIZING REVIEW OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S GUIDANCE STATEMENTS AND POLICIES BY THE GENERAL ASSEMBLY'S REGULATION REVIEW COMMITTEE.

H.B. No. 5125 (RAISED) AN ACT CONCERNING THE IDENTIFICATION OF SOURCES OF POLLUTION OUTSIDE OF THE STATE THAT CONTRIBUTE TO THE POLLUTION OF THE STATE'S AIR, WATER AND LAND.

H.B. No. 5127 (RAISED) AN ACT CONCERNING THE IMPLEMENTATION OF THE PROPOSALS OF THE OZONE TRANSPORT COMMISSION.

S.B. No. 120 (RAISED)

AN ACT AUTHORIZING REVIEW OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S GUIDANCE STATEMENTS AND POLICIES BY THE GENERAL ASSEMBLY'S REGULATION REVIEW COMMITTEE.

CBIA SUPPORTS THIS BILL

Connecticut's Department of Environmental Protection (DEP) has broad authority to adopt regulations that affect a wide variety of businesses throughout the state. All regulations are required to be adopted in accordance with Chapter 54 of the Connecticut General Statutes -- commonly known as the Uniform Administrative Procedures Act. That process ensures, among other things, that the DEP's proposed regulations are reviewed for their economic impact and consistency with state law and policies by both the executive and legislative branches of government, before they become effective and the law of the land.

However, the Department also has a history of issuing "guidance", "policies", "forms" and other documents that the agency utilizes as definitive and enforceable *interpretations* of its regulations. We have attached a list of recent examples of this practice to this testimony.

The statutory definition of "regulation" is found in Section 4-166(13) of the Connecticut General Statutes. It states:

"Regulation" means each agency statement of general applicability, without regard to its designation, that implements, *interprets*, or prescribes law or policy . . ."

Just two months ago, the General Assembly's Legislative Commissioner's Office released its latest "Manual for Drafting Regulations." The document provides further clarity in distinguishing between regulations and other types of agency directives. It reads:

"For a regulation to be valid, an agency must comply with the rulemaking process set forth in chapter 54 of the Connecticut General Statutes."

"According to the [statutory] definition, if an agency drafts *any* directive that has general applicability, *whether or not it is designated a regulation*, it is considered a regulation.

Thus, if an agency drafts "guidelines", "procedures" or any other statement that affects the rights of private persons or entities, the agency should adopt such statement as a regulation in accordance with the procedures set forth in chapter 54 of the Connecticut General Statutes".(emphasis added)

SB-120 would not limit the agency's authority to issue true "guidance", "policy" or other such documents. It would, however, provide a reasonable "check" on that authority such that if the DEP drafts or implements one of these documents in a manner that reflects a duty to adhere to its provisions, aggrieved persons or entities representing them could petition the legislature's Regulations Review Committee to make a determination as to whether the document, on its face or as implemented, constitutes a regulation that must be adopted in accordance with the Uniform Administrative Procedures Act as set out in Chapter 54 of the Connecticut General Statutes.

CBIA greatly appreciates the Environment Committee raising this bill and we strongly urge its passage.

ATTACHMENT TO CBIA'S TESTIMONY ON SB-120

EXAMPLES OF "GUIDANCE", "POLICY", "FORMS" AND OTHER DOCUMENTS USED BY DEP AS REGULATION.

1. **Site Characterization Guidance Document (SCGD)** – The DEP's Remediation Standard Regulations ("RSRs") were developed to answer the question "how clean is clean enough" and thereby allow Licensed Environmental Professionals ("LEPs") to conduct essentially privatized cleanups. As for characterizing the nature and extent of contamination to be cleaned up, the regulations require that LEPs investigate in accordance with "prevailing standards and guidelines." Subsequently, DEP developed its SCGD and contends it constitutes an enforceable interpretation of what constitutes "prevailing standards and guidelines." This approach was not contemplated in the development of the RSRs which, instead, intended that site characterization would be determined by the LEP based on their professional experience and judgment. The agency is also applying this document retroactively to sites that entered the LEP cleanup program prior to issuance of the SCGD in 2007. This has resulted in significant additional costs for many sites.
2. **Verification Guidance Document (VGD)** - is another example of a guidance document being used as a regulation and being applied retroactively. Many sites that have been cleaned up by an LEP consistent with the RSRs have been "reopened" and the LEPs required by the DEP to rewrite their cleanup verifications consistent with this guidance document. The estimated cost to do so ranges from about \$5,000 to \$20,000.
3. **Waste Concrete Guidance Document** – Many brownfield and other redevelopment projects generate waste concrete from demolition of basements, foundations and slabs. DEP waste regulations say that concrete can be used as "clean fill" if it is inert (e.g. poses no risk to human health or the environment). However, the Waste Concrete Guidance Document created by DEP states that concrete that is painted or stained is considered to be "contaminated" and therefore can not be used as clean fill. This is inconsistent with the regulations. Additionally, the guidance document indicates that a disposal alternative is to transport the concrete waste to a recycling facility. Yet, DEP has not issued a permit for any such facility to operate in the state.

4. **Asphalt Containing Fill Policy:** Similar to the Waste Concrete Guidance Document (#3), DEP waste regulations allows "clean fill" to contain asphalt. However, DEP currently treats asphalt in fill as a "release." This is in direct conflict with the regulations. Numerous sites throughout Connecticut have such fill. Treating this ubiquitous material as contaminated waste can be cost-prohibitive for a brownfield or other redevelopment project.

5. **Environmental Land Use Restrictions (ELURs) Guidance** – ELURs are used as an alternative to cleaning up to regulatory numeric criteria where there is a willingness to limit the future use of the contaminated area such that human exposure can be prevented. However, DEP recently issued guidance that ELURs designed to prohibit residential use must be boundary to boundary and cannot be applied to specific release areas. Again, this is not contemplated in the regulations.

6. **Guidance on Volatilization Cleanup Criteria** – In 2003, DEP proposed regulations defining cleanup requirements based on substances that could migrate through soil in the form of vapor. The regulations were never adopted. Yet, DEP has issued guidance stating that LEPs must use the 2003 proposed volatilization criteria for cleanup requirements.

7. **Data Validation Policy** – DEP has issued guidance that requires laboratory data used for verifying cleanups to undergo new data validation processes.

8. **Completion of Investigation Transmittal Form:** Issues analogous to those cited above for the ECAF are present within this document as well. Currently, the site investigation requirements are all guidance documents, but are used to identify deficiencies in submittals and the basis for enforcement actions. As an example, when excavation is used as a remedial alternative, DEP's policy is that the remedial standard to meet is non-detectable.

9. **Environmental Condition Assessment Form (ECAF)** - The newest version of the ECAF (2/8/10) contains examples for regulation by policy:
 - a. Part V, Section 4 requests information on "Sediment Investigation". Sediment is specifically excluded from the RSR and Connecticut has no statutory sediment standards.
 - b. Part VI, Section 3 requests information on a "Scoping-Level Ecological Risk Assessment." The only options are "Completed" and "Pending" which implies that this assessment is required. It is not clear that statute provides for this requirement. The estimated cost for this type of assessment is \$25,000 to \$50,000 or more.
 - c. Part VII, Section 6 request information on various receptors. None of this is addressed directly in statute. The LEP must be protective

of human health and the environment and should be making the necessary determinations and investigations on a site by site basis.

10. Extending the Liability of the Certifying Party under a Form III:

Current DEP policy is that the Certifying Party is responsible for investigating all areas of concern and remediating all releases, even those which were created or occurred after the property has been sold. If the Certifying Party is the former owner, they are placed in a position where they are responsible for environmental matters that are well beyond their control. It also makes it difficult or impossible for the LEP to ever verify the site.

11. Connecticut Regulated Waste Designations - DEP's "Connecticut regulated waste" program controls the handling of certain non-"hazardous" wastes. Through guidance documents, the agency has created the several subcategories for tracking the shipments and the treatment and disposal of these materials. But there are countless ambiguities in this program due to a lack of clear regulations instead of the multi-guidance approach.

12. Upgradient Landowner Letter – DEP uses this letter as if it were a regulation by defining "informal setback requirements" for wetlands and water permitting that they "like" and "enforce" but cannot point to any basis for how the setbacks were derived. If you don't comply, the DEP will not issue a permit.



Connecticut Business & Industry Association

HB-5127 (RAISED)

**AN ACT CONCERNING THE IMPLEMENTATION OF THE PROPOSALS OF
THE OZONE TRANSPORT COMMISSION.**

CBIA SUPPORTS THIS BILL

The federal Clean Air Act created a regional commission made up of 10 northeastern states and the District of Columbia to address air quality programs associated with the interstate transport of ozone (the Ozone Transport Commission - "OTC"). The commissioner of Environmental Protection serves as the Governor's designee to the OTC.

Periodically, the OTC proposes measures for reducing emissions from certain categories of sources and asks member states to agree, generally through a resolution or memorandum of understanding ("MOU"), to adopt these measures at the state level through regulation.

The regulated community in Connecticut has experienced circumstances where the DEP, having already signed-off on an OTC resolution or MOU, proposes a regulation in Connecticut to implement that agreement, receives substantive comment from affected industries, but then declares that while it sees merit in some of the comments, it is not in a position to modify the proposed regulation due to the state's previous commitment to the OTC through resolution or MOU.

While the Clean Air Act does provide for notice and comment at the OTC and federal EPA levels prior to finalizing its agreements, no such requirement exists at the state level. At least one state, Pennsylvania, has adopted its own law requiring such opportunity at the state level (please see attached). We believe it is wise for Connecticut to do the same.

CBIA believes the current language of HB-5127 needs modification to insure this result. As currently drafted, the bill only insures that DEP will conduct outreach and seek input before implementing any proposal of the OTC. This is already done to some degree as the DEP must hold a public hearing with at least a 30 day notice period prior to adopting regulations. What is critical is that the DEP initiate an outreach and comment opportunity prior to the state binding itself to substantive OTC control measures through an OTC resolution or memorandum of understanding.

CBIA would be glad to work with the committee to modify the language accordingly. As a starting point, we recommend the following:

(NEW) (Effective October 1, 2010) The state of Connecticut, serving through its representatives on the interstate transport commission formed under the Clean Air Act (42 USC 7506), shall provide for public review and comment on commission recommendations prior to final commission action and shall make reasonable efforts to educate and solicit input from affected sources prior to final commission action. The state shall not bind itself to any commission recommendations through resolution or memorandum of understanding prior to fulfilling the requirements of this section.

CBIA greatly appreciates the committee raising HB-5127 and we urge passage with language that meets the intent of the legislation.

**Section 7.4 of the Pennsylvania Air Pollution Control Act
(35 P. S. § 4007.4).**

Section 7.4. Interstate Transport Commission.--(a) The Commonwealth, through its representatives on an interstate transport commission formed under the Clean Air Act, shall provide public review of recommendations for additional control measures prior to final commission action consistent with the commission's public review requirements under section 184(c)(1) of the Clean Air Act. The opportunity for public review established under this section shall run concurrently with the commission's public comment period established under section 184(c)(1) of the Clean Air Act.

(b) Control strategies approved by an interstate transport commission and by the Commonwealth's representatives and set forth in resolutions or memoranda of understanding shall be considered commitments by the executive to pursue subsequent legislative, regulatory or other administrative actions to implement the control strategies.

(c) The Commonwealth strongly recommends that an interstate transport commission adopt formal procedures which allow for an open public review and comment period prior to the adoption of resolutions or consideration of memoranda of understanding or other actions which recommend that states adopt control strategies. The Commonwealth's representatives shall take actions consistent with this recommendation.

(d) The General Assembly of Pennsylvania finds that the interstate transport of pollutants from the State of Ohio contributes significantly to the violation of national ambient air quality standards by the Commonwealth. Therefore, as set forth in section 176A of the Clean Air Act, the Governor, on behalf of the Commonwealth, may petition the Federal EPA Administrator to include the State of Ohio in any interstate transport commission to which Pennsylvania is a member state. (7.4 added July 9, 1992, P.L.460, No.95)



Connecticut Business & Industry Association

HB-5125 (RAISED)

AN ACT CONCERNING THE IDENTIFICATION OF SOURCES OF POLLUTION OUTSIDE OF THE STATE THAT CONTRIBUTE TO THE POLLUTION OF THE STATE'S AIR, WATER AND LAND.

CBIA SUPPORTS THIS BILL

The DEP is experiencing increasing strain on its resources as it attempts to continue administering programs in essentially the same manner it has for decades while absorbing additional responsibilities from the federal EPA and the state legislature. The vast majority of these programs target industry and reflect an image of industry decades out-of-date. Additionally, data are indicating that Connecticut industry comprises an ever decreasing percentage of the overall pollution impacting our state. Yet, EPA and DEP regulations continue to largely focus on industry as the problem and adopt regulations with the potential to affect minimal, if any environmental improvement, while burdening businesses and our economy with higher and higher costs.

Connecticut needs to begin now periodically compiling and reviewing the latest data regarding sources of contamination to our air, water and lands and to align its priorities and resources towards addressing those sources, both within and outside the state, that most significantly impact our environmental quality.

HB-5125 directs the DEP to work with the Connecticut Academy of Science and Engineering (CASE) every 4 years to compile data identifying source categories, including those outside the state, that significantly contribute to the pollution of our air, water and lands. This document would be extremely valuable to the

public, the legislature and the DEP as a tool for insuring environmental programs are appropriately aligned with the most significant categories of contribution.

We understand that CASE estimates such a periodic analysis would cost approximately \$30,000 - \$40,000 per cycle, plus inflation. CBIA suggests this would be a wise investment and could be funded through the DEP's Supplemental Environmental Project (SEP) program whereby entities facing penalties through an enforcement case can satisfy some of that obligation by funding an SEP. Again, an excellent investment for policy-makers, the public and the environment.

CBIA greatly appreciates the Environment Committee raising this bill and we ask your continued support in moving it to final passage.