Connecticut Fund for the Environment

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Testimony of Connecticut Fund for the Environment (Joined by Rivers Alliance of CT)

Before the **Environment Committee**

February 22, 2010

STRONGLY OPPOSING **Raised Bill 120** AN ACT AUTHORIZING REVIEW OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S GUIDANCE STATEMENTS AND POLICIES BY THE GENERAL ASSEMBLY'S REGULATION REVIEW COMMITTEE, **Raised Bill 5125**, AAC THE IDENTIFICATION OF SOURCES OF POLLUTION OUTSIDE OF THE STATE THAT CONTRIBUTE TO THE POLLUTION OF THE STATE'S AIR, WATER AND LAND, **Raised Bill 5127** AAC THE IMPLEMENTATION OF THE PROPOSALS OF THE OZONE TRANSPORT COMMISSION.

Roger Reynolds, Senior Attorney

Connecticut Fund for the Environment ("CFE") is a non-profit environmental organization with over 6,500 members statewide. For thirty years, CFE has used law, science and education protect and preserve Connecticut's natural resources.

Connecticut Fund for the Environment and Rivers Alliance of CT **STRONGLY OPPOSES Raised Bills 120, 5125 and 5127.** The bills would place additional and unnecessary burdens on an already overburdened and underfunded environmental agency and would cripple the agency's already severely limited ability to act in a timely manner.

The state has severely underfunded the Department of Environmental Protection for decades. As a result, the agency has had to continually do less with more. This has meant that enforcement is weakened and the permitting and regulation making process can routinely take more than a decade. The aquifer protection regulations took 14 years to pass and although the streamflow statute was passed in 2005, the regulatory process is still incomplete. All three of these proposed bills add additional and unnecessary burdens on the agency that do nothing to protect the environment.

SB 120 would improperly (and most likely unconstitutionally) take for the legislature a power that is properly exercised by the courts. To the extent any stakeholder believes that DEP is improperly and illegally treating a regulation as guidance, the Administrative Procedure Act sets out the process for challenging such action concluding, if necessary, in a court determination. While the review of regulations has been delegated, by the Constitution, to the

legislature (See Article XVIII of the Connecticut Constitution) deciding a controversy between stakeholders and the DEP as to what is or is not a "regulation" under the Administrative Procedure Act is a purely judicial function to be exercised by the judicial branch *See generally*, *State v. Darden*, 171 Conn. 677, 679 (1976). If this bill were enacted into law, each time there was a disagreement, a stakeholder could petition the Regulation Review Committee to hold a hearing. Because the legislature cannot make a final determination in this manner, and because there would most likely be parallel court proceedings under the APA, this would do nothing but create confusion, conflict and uncertainty. This is an unnecessary and unauthorized intrusion into the judicial process that would require substantial additional time and resources and would simply create confusion and uncertainty.

Issuing limited guidance is one way that the agency can provide much needed direction while regulations are going through the formal process. Moreover, as circumstances change, guidance can be easily amended. In 2000, DEP testified in a court case that the stream flow standards were outdated and had no ecological basis, yet it is now 10 years later and, despite efforts and a statute, no new standards have been passed to replace them. As environmental organizations, we support transparency and public participation and encourage the agency to have public forums and solicit input on its guidance documents periodically. If guidance crosses the line to a regulation, however, it should, and will, be challenged through a proper court proceeding. Creating unnecessary, quasi-judicial and resource consuming hearings in the legislature, however, will do nothing to help.

HB 5125 would inappropriately require DEP to expend funds from court settlements, or Supplementary Environmental Projects (SEPs), on studying pollution from out of state air sources over which DEP has no jurisdiction. SEPs are settlements from enforcement actions against polluters that should be used to reduce actual pollution. Studying out of state sources, over which DEP does not have jurisdiction, is a wasteful diversion of state resources. The last thing an underfunded over-worked agency needs is to be forced to spend scarce funds for pollution reduction on yet another study of a problem that is largely regulated by the federal, not the state, government.

Finally, in the same vein, **HB 5127** requires additional, and we believe unnecessary, mandatory process before the proposals of the Ozone Transport Commission ("OTC") can be implemented. We believe that the Administrative Procedure Act and additional forums offered by DEP are more than adequate to allow for stakeholder participation.

To the extent that a proposal of the OTC would require DEP to adopt regulations, the Uniform Administrative Procedures Act already requires a notice and comment period. To the extent that the OTC's actions are advisory to the EPA, the regulated community may comment directly through EPA's notice and comment procedures prior to any final action on those recommendations.

In addition, DEP is already providing an additional forum for input from the regulated community through the OTC Control Measure Development Subcommittee of the State Implementation Plan Revision Advisory Committee (SIPRAC).

For the above reasons, we **STRONGLY OPPOSE** the above statutes that would severely strain DEP's resources and cripple its ability to effectively fulfill its mission.