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And
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HB 6526

My name is Ann Catino and I am a partner at the law firm of Halloran & Sage in Hartford. I have practiced for almost 25 years in the area of environmental law. For the past year, I have served as co-chair of the Brownfield Working Group established pursuant to Section 2 of Public Act 10-135. Prior to this position, I served for three years as co-chair of the State's Task Force on Brownfield Strategies.

I want to first thank the Commerce Committee chairs and the Committee members for their leadership on brownfield initiatives in this State. Beginning in 2006, this Committee drove the issue and broke new ground on many new and innovative programs. The Office of Brownfield Remediation and Development was established. New programs were developed administered by the Department of Economic and Community Development. A pilot program was established and funded to assist municipalities in development brownfield projects. A revolving loan program was established to provide needed funds to stimulate investment by the private sector. Flexibility was added to the programs administered by DECD, the Department of Environmental Protection and some obstacles relating to the standard liability schemes were removed for certain types of brownfield redevelopment.

This year, I have enjoyed working with members of the Working Group, DECD, DEP, CDA and various other stakeholders and interested parties as we move forward on a new frontier of brownfield programs. Our report, which was submitted to the Commerce Committee today, provides the context for my testimony and provides a greater depth of analysis and discussion. In brief, this year we spent time not only on the report, but on proposed legislation, which is largely represented in HB 6526. I want to acknowledge that some of the sections in the bill, as is expressed in our report, were not universally embraced by members of the Working Group and are "works in progress." I look forward to continuing the dialogue that began so that again this year a bill can move forward that will serve to stimulate investment and economic development in the brownfields of our state.

My co-chair, Gary O'Connor, has testified about organizational and funding improvements that are needed and I wholeheartedly support his testimony and comments. The Abandoned Brownfield Clean-Up (ABC) program is an innovative program that grew out of the Task Force's efforts, but as we move forward it needs further streamlining as set forth in the bill and the proposed report.

My testimony will step up the dialogue a notch further and ventures into another realm. Many challenges exist when brownfield development meets the statutory and regulatory clean-up programs administered by the DEP. It is at the juncture of brownfields and contaminated property programs that improvement is needed so that more properties do not become brownfields. More needs to be done.

In our report, we identify five areas that need fixing to stimulate the clean up of brownfields and contaminated properties. These modifications serve to move both types of properties through the DEP process more efficiently and effectively.

First, the Transfer Act should be amended to provide clarity to buyers and sellers of property as to what a certifying party needs to investigate and remediate. Section 4 of the HB 6526 addresses this issue. This is an issue of *fundamental fairness*. The Transfer Act was enacted to insure that buyers understood the condition or the risk associated with a certain type of property and that the cleanup of the property was addressed at the time of a transfer of the property or business. However, it has been interpreted to require sellers who may be certifying parties to investigate and remediate not only the historical contamination, but contamination that post-dates the sale. It is inequitable to require sellers to investigate and remediate releases that occur after they relinquish title and essentially lose control of the property. While sellers may have a claim against subsequent property owners, those property owners are not truly held accountable for their own acts. As a result, a prior seller who is a certifying party may not escape the rigors of the Transfer Act, the negotiations of sales become overly complex, subsequent sales can point to the first certifying party to address all releases, and the property may potentially fall into abandonment when stagnation sets in. On February 3, 2010, the Environmental Professionals Organization of Connecticut submitted a “white paper” to DEP on this issue, which correspondence is included in the Working Group report. I believe that Section 4 of HB 6526 provides an important clarification that unambiguously affixes a time frame to guide sellers and buyers when addressing cleanups under the Transfer Act. This clarification is necessary so that prior owners can close out their responsibility and liability for a property.

Second, by statute, DEP should be required to periodically review the Remediation Standard Regulations, which are the standards that guide all property cleanups. These standards have not been revised in approximately 15 years. Issues exist with the standards and the methods by which compliance with them is demonstrated. There are very real impediments to cleaning up properties and the DEP should update them. Modifications are necessary, additional regulatory flexibility is warranted consistent with environmental protectionism, but such challenges are especially acute when confronted with brownfield sites. Efforts to modify the RSRs are difficult and riddled with challenges. As a result, no changes are made. Section 5 of HB 6526 requires the Commissioner to review and recommend revisions to the RSRs three years after this amendment goes into effect, and to hold a public hearing every five years thereafter on the adequacy of the standards and revise as needed to insure that the regulations insure environmental protection and are consistent with best available scientific information. In addition, the Commissioner has to determine whether new standards are feasible and achievable and whether such proposed limits are economically or technically achievable. The Working Group believes that DEP should periodically review the RSRs and modify them as needed.

Third, flexibility needs to be built into the surface and groundwater reclassification mapping. The entire state is generally mapped; however, the maps are imperfect and sometimes, on a case by case basis, information is revealed that demonstrates that the mapping should be modified. This is especially true with the brownfield sites that are along rivers, in urban areas and that dot our State. To enhance brownfield redevelopment, the process of remapping should be more streamlined. Last year, Public Act 10-158 required the Commissioner to modify the State's groundwater classifications and standards through a rulemaking process set forth under the Uniform Administrative Procedures Act (UAPA). Including simple mapping modifications into this process was an unintended consequence. This session, such mapping should be excluded from the UAPA and section 9 of HB 6526 provides such an exclusion, while also providing adequate notice and comment opportunities.

Fourth, an alternative to the Environmental Land Use Restriction is necessary. An ELUR is an enforceable contract that conveys a property interest to the Commissioner of DEP. It requires the subordination of current holders of property interests before it can be recorded. Current and future property owners, current interest holders (who have subordinated) and future interest holders are legally bound to comply with terms and restrictions of the ELUR. The problem with an ELUR is obtaining a subordination agreement from the prior encumbrancers, particularly the utilities. As a result many sites are not remediated and are not closed out. An alternative is sorely needed and DEP recognizes that something must be done and DEP put on the table a "Notice of Activity and Use Limitation" (NAUL), which is intended for less contaminated properties (generally within the order of magnitude of the RSR criteria). It is less cumbersome than an ELUR in that the subordination of current property interests is not required. The NAUL is incorporated in section 13-14 of HB 6526.

The NAUL is a work in progress. Massachusetts has one, but DEP's proposal is not a simple as the one in Massachusetts in so far as the proposal seeks to reach back to prior encumbrancers and the owner is held responsible for the acts of such encumbrancers. In addition, the Working Group sought comments from other environmental lawyers and real property lawyers and those comments are included in the report. We are optimistic that we can move forward on this concept with the DEP and the Committee so that another tool is available in the toolbox that will allow a brownfield and contaminated to be closed out.

Fifth, and finally, section 17 is a new program, called a Brownfield Remediation and Revitalization Program; it represents a paradigm shift to move brownfields and contaminated properties more quickly and efficiently through the process. The Working Group report provides considerable detail of this program. It identifies those properties and property owners that are eligible, establishes important criteria for consideration by OBRD when a property is presented for entry and, quite significantly, establishes time frames for action or approval is automatic. Relief from investigating and remediating contamination that has migrated off-site is provided. Exemptions from the Transfer Act is allowed through participation in the program. Liability relief is a significant component. Initially, the applicant is not held liable for the existing conditions, provided it did not create them. But this liability protection could extend to predecessor owners and operators, regardless of that person's eligibility to participate in the

program, provided the property is cleaned up. However, liability protections are not extended to any responsible party for contamination that has migrated from the property.

Entry into the program is limited to 20 properties and it should read 20 properties per year. A property must meet the following criteria: (1) the likely creation of jobs, including those related to the cleanup; (2) the projected increase to the municipal grand list; (3) the consistency of the property as remediated and developed with municipal or regional planning objectives; and (4) the development plan's support for and furtherance of principles of smart growth or transit oriented development.

In fairness to some of our Working Group members, the details of this program were not unanimously embraced. It does present certain issues and is a departure from the standard programs. One glaring example, too, is that section 17 of HB 6526 includes a provision (subsection (g)) that overlays a layer of analysis on the variety of criteria previously established for the funding programs that grew out of this Committee and it creates inconsistencies and ambiguities.

This program was proposed to the Working Group for consideration and we have included it because there should be a larger dialogue on it. It represents the next generation of programmatic and policy change. This program will have supporters and detractors, each with their own didactic, which you will likely hear today. As in the past, we are supportive of furthering the discussion and taking direction from the Committee to see if we can arrive at solution.

Finally, the Working Group is most interested in DEP's proposed comprehensive evaluation of DEP's remediation programs, including the much maligned and often controversial Transfer Act. This agency self-evaluation is long overdue and has been recommended by the prior Task Forces. The Working Group welcomes DEP's initiative, and it looks forward to a candid assessment of the state's remediation programs, their efficacy and issues, and proposals for improvement. However, it believes that certain parameters and time frames should be placed upon the DEP. As a result, section 7 of HB 6526 sets forth various items DEP should evaluate and mandates that DEP complete its evaluation by February 1, 2012, prior to the next legislative session so that any necessary statutory modifications can be proposed and acted upon.

We hope you find that the Working Group has served as a catalyst for innovative thought to take place, the result of which is HB 6526. With each session, this Committee has taken a decisive step forward with new programs and modifications to existing programs to address the State's brownfields and underutilized properties. More needs to be done as set forth in the Working Group's report and as discussed today. I commend you in leading the charge.

Thank you.