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Environment Committee

Raised Bill 375,
AN ACT CONCERNING REIMBURSEMENT UNDER THE UNDERGROUND STORAGE TANK PETROLEUM CLEAN-UP PROGRAM

I am writing to submit a few, general comments on Raised Bill 375. I am an environmental attorney with the firm of Carmody & Torrance LLP. Over the years, I have assisted municipalities, innocent third parties, "Mom & Pop" station owners, local petroleum marketers as well as some regional and national companies with their applications to this program. I represent a number of applicants awaiting payment for approved but unpaid applications, as well as applicants whose claims have been pending for some time.

I understand that the state is weathering a fiscal crisis and that funds are not readily available, even to honor existing obligations. I also understand that the proposal before you today is an attempt to manage those obligations as fairly as possible within available resources. I do not believe that Raised Bill 375 succeeds in that effort. While there are a number of smaller issues, I am most concerned that its retroactive provisions raise serious constitutional issues, that the sunset dates for supplemental claims are too short and that the bill employs an unworkable "asset" test to classify applicants.

Retroactive Provisions

Raised Bill 375, would change the terms and conditions under which previously approved applications were paid, requiring applicants to submit additional application materials and/or wait up to 16 years for payment, without interest. The Bill would also change the criteria for processing and paying applications that were submitted under a prior law but which have not yet been processed by the state. These retroactive provisions, like the 2005 amendments to the program, raise constitutional issues. In 2005, DEEP appealed over 50 applications over the issue of whether the 2005 amendments to this program could be applied retroactively to pending claims. The DEEP settled each of those appeals. Unlike the issues addressed by DEEP and applicants in 2005, the issues presented by Raised Bill 375 are not likely to be resolvable through a negotiated settlement.

There is not time and this testimony is not the vehicle for a thorough briefing on the constitutional issues raised by Raised Bill 375 but I would like to raise two points. First, the proposal to defer payment of previously approved claims for up to 16 years is arguably an unconstitutional, retroactive taking. A similar claim was raised in *A. Gallo & Company*

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v. Gina McCarthy, 51 Conn.Supp. 425 (2010). That case was brought by beverage distributors in response to Public Act 09-01 which appropriated unclaimed bottle deposits from an account that was maintained for the distributors into the State's general fund. The distributors asserted that the Act amounted to a retroactive legislative taking of their property in violation of the 5th and 14th Amendments of the United States Constitution, Article I, Section 11 of the Connecticut Constitution, and 42 U.S.C. § 1983. The Superior Court ruled in favor of the distributors, ordered payment of the deposits and also awarded interest and legal fees. The case is now on appeal to the State's Supreme Court.

Similarly, there is law to support a requirement that applications be reviewed and approved in accordance with the substantive law that was in effect at the time the applications were filed. The District Court addressed this issue in *DeCardenas v. Reno, et al.*, 278F. Supp2d 284, (D. Conn. 2003). In that case, an alien filed an application for relief under the immigration laws. The immigration agency did not act on her application in a timely manner. The law then changed and the agency sought to reject her application under the terms of the new law. The court ruled that the statute could not be applied retroactively, stating "[t]hrough no fault of her own, administrative hearings on [Ms. DeCardena's] application were unnecessarily delayed...compromising the timeliness of her application. It is clear that this series of administrative oversights and procedural defects deprived Mrs. DeCardena of an important opportunity to make her case for [INS] relief." I believe that, as drafted, Raised Bill would have the same, impermissible effect on pending applications.

Sunset Dates

I understand the need to sunset this program but the proposed deadlines are impossibly short for smaller businesses. Those busineses may be able to perform investigations and submit notices of claims by September 30, 2013, but under the current Connecticut standards for remediation, it will not be possible to complete the on site and any off site investigation and remediation or compensate third parties for the harm caused by a release, before September 30, 2014. In consequence, I believe that the EPA would still have grounds to decertify the program if Raised Bill 375 were enacted.

Classification of Applicants

Finally, even if the constitutional issues were not fatal and the sunset dates feasible, I believe that the proposal to classify applicants based on the number of service stations the applicant "owns or owned, operates or operated, leases or leased, uses or used, or has or had an interest in" anywhere in the United States is unworkable. This classification relies on information that is not readily ascertainable by either the applicants or by DEEP staff. For example, it is not possible to determine who has leased much less "used" a service station. The classifications would not accomplish DEEP's goal of separating small businesses from large ones. For example, local, family owned businesses would be classified as Mid-Sized station applicants whereas multimillion dollar companies like

World Wrestling Entertainment, Inc. that own one former station, would qualify as Small Station Applicants. The classification would also create an additional layer of bureaucracy in an agency that is already understaffed and underfunded. I believe that, if the state needs to classify applicants for purposes of sunsetting the program, it should use the criteria established by EPA under its financial assurance regulations at 40 CFR Part 280 or criteria that have been employed successfully in other states.

In summary, rather than enact a bill that is certain to be challenged and likely not to satisfy EPA's requirements for financial assurance, I ask that this Committee and DEEP reconsider Raised Bill 375, especially the applicant classifications, the proposed payment mechanisms and sunset dates.

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MAP/rml