

February 27, 2015

To:

The Environment Committee, State of Connecticut
Room 3200
Legislative Office Building
Hartford, CT 06106
Ted Kennedy, Jr., Chairman

From:

The Berkshire-Litchfield Environmental Council (BLEC)
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RE: HB 5710: AN ACT AUTHORIZING THE COMMISSIONER OF ENERGY AND ENVIRONMENTAL PROTECTION TO SEEK ENFORCEMENT OF PROHIBITIONS AGAINST PERSONS ENCROACHING ON STATE-OWNED OPEN SPACE.

Dear Chairman Kennedy and Members of the Environment Committee:

The Berkshire-Litchfield Environmental Council (BLEC), a 501 (3)(c) non-profit organization that focuses on environmental issues affecting the Northwest Corner of Connecticut and the Berkshires region of Massachusetts, would like to thank Representative Roberta Willis for introducing Bill #5710, which attempts to clarify jurisdiction regarding the protection of our state forests. BLEC would, however, like to see the bill strengthened so that other environmental organizations can avoid the situation that compelled BLEC to step up in a case of egregious of timber trespass and destruction of the Housatonic State Forest in Canaan, CT., resulting in the current law suit described below.

HB 5710, as currently worded, in our opinion, misses the mark on the larger legislative remedy BLEC seeks to truly protect significant public assets for all generations and wildlife. Toward that end, BLEC asks the committee to please consider the attached amended language.

Brief History:

The Berkshire-Litchfield Environmental Council was founded in 1970 to stop a massive, environmentally destructive, hydroelectric pumped storage power plant proposal on Canaan Mountain that was identical to the proposed facility in New York State at Storm King Mountain that began the environmental movement. As such BLEC has a long history of defending this specific area. BLEC addresses diverse environmental subjects, such as land preservation, zoning controls, vernal pools protection, good forestry practices, the environmental effects of radio frequency radiation associated with inappropriate siting of telecommunications infrastructure, and industrial-scale wind turbines. Our focus is historically on the environmental effects of infrastructure. BLEC holds regular educational forums on emerging environmental issues with speakers from federal agencies and researchers from around the world.

BLEC President, Starling W. Childs, has a masters degree in forestry from the Yale School of Forestry, and is a lecturer there, introducing each year's graduate students in forestry to a crash course in environmental sciences at his family's Great Mountain forest in Norfolk, CT. He is also President of EECOS Inc. Environmental Consultants -- a land-use planning/scientific assessment group specializing in innovative farm and forest management and creative development designs with clients throughout the US and Europe. His father, Edward Childs, was one of BLEC's founders.

Legislative History as it pertains to HB 5710:

In 2006, after a series of destructive clear-cuts on public lands, then-Connecticut Attorney General Richard Blumenthal, Representative Roberta B. Willis and others were instrumental in the passage of Public Act 06-89, which resulted in the adoption of General Statutes § 52-560a, "Damages for Encroachment on State, Municipal or Nonprofit Land Conservation Organization Open Space Land. Attorney General Enforcement. Civil Action."

The legislature was motivated to act by the efforts of Connecticut's dedicated land trusts and by a Council on Environmental Quality (CEQ) report entitled "Preserved But Not Protected" (December 20, 2005). The CEQ report concluded that the Department of Energy and Environmental Protection (DEEP) "...is not equipped to protect state lands from encroachment" and recommended that DEEP be required to "refer all encroachments to the Attorney General for swift action." The legislature took CEQ's recommendations to heart and crafted § 52-560a, a statute that gave the Attorney General authority to "bring an action in the superior court" against any encroacher of open space land. The statute did not give DEEP any similar authority, as its purpose was to bring encroachers of open-space land into superior court. The statute also limited the discretion of the court – requiring it to, at a minimum, order violators of the statute to restore the land to its condition as it existed prior to the violation, or to award costs of restoration. It also allows the court to issue civil penalties of up to five times the cost of restoration and to award attorney's fees to the plaintiff.

Section 52-560a provides protection to our forests and open space lands by providing specific procedures by which the Attorney General is to pursue civil remedies for damages from

those who timber trespass on state and open space lands. The legislature recognized the importance of superior court oversight. For example, Representative Willis commented that it was the court's responsibility to “try to get as much damages as they can to get the property back to where it was once.”

Behind this legislation was the clear-cutting of 2.5 acres of land owned by the East Haddam Land Trust and The Nature Conservancy next to the Goodspeed Airport. Another case involved the 150-year old trees that no longer exist in Carey Pasture because a construction company ignored the clear markings of the Farmington Land Trust. The protection provided by then-existing law was not sufficient to deter timber trespassers. Section 52-560a was adopted to provide the Office of the Attorney General with sufficient muscle to make sure that trees would not be casually cut again on conservation land.

The above incidences involved private land but unfortunately the first time someone trespassed on state forest after the passage of §52-560a and clear-cut 2.5 acres on Canaan Mountain in the Canaan Mountain Natural Area Preserve, the Commissioner of DEEP decided that statute gave him, not the Attorney General, the power to settle with the violator. The Commissioner scuttled the legal process by employing an administrative consent order, rather than by employing the procedure required by law. The case was never referred to the Office of the Attorney General. In fact that office was unaware of the situation until BLEC filed suit. And the Commissioner also decided to ignore the statutory requirement that the land be restored to its condition as it existed prior to the violation.

In 2013, BLEC initiated a law suit against the DEEP Commissioner, the DEEP Deputy Commissioner (who signed the consent order), the Department and others over their inappropriate, inadequate and extremely lax response to the destructive clear-cut on public lands in a state-listed critical habitat seeking to set aside the action by the Commissioner *et al.* The Attorney General filed a motion to dismiss; that motion was granted and is now on appeal.

BLEC considers §52-560a a critical law that must not be defanged by allowing violations to be settled by administrative consent orders — essentially deals that are reached in a conference room at DEEP that never see the light of day until after being signed, sealed and delivered. What happened on Canaan Mountain and at DEEP must not happen again. Unfortunately HB 5710 inadvertently legitimizes that very course of action and BLEC urges the committee to strengthen the language as recommended.

BLEC's legal case as it pertains to HB 5710: Specific Case Background:

- In May of 2010, a subcontractor of BNE Energy — a CT-based industrial-scale wind turbine generation startup — trespassed into the Housatonic State Forest located high on Canaan Mountain in Canaan, CT., and clear-cut 2.5 acres of old growth forest. BNE claimed they thought they were on private property owned by clients who had given

permission for a test site for a wind turbine, but in fact they were on state-owned land. Simple GPS equipment used by all professional foresters would have told them precisely where they were. They never followed the traditional practice of calling the abutting landowner, in this case the State of Connecticut, to see if there was agreement as to the location of the property boundary. This was no easy “mistake” but rather one professionals go to great lengths to avoid as their very livelihoods depend on it.

- Over several days’ time, with massive equipment onsite, BNE clear-cut old-growth trees in what is a known rare, slow-growing, dry, subacidic forest found near summits. The Housatonic Forest is one of only 25 non-aquatic habitats noted as “key habitats of greatest conservation need” in the Connecticut Comprehensive Wildlife Conservation Strategy of the Connecticut Department of Environmental Protection Bureau of Natural Resources and approved by the U.S. Fish and Wildlife Service in 2006. As such, that forest is among the rarest, most unique and threatened habits in the state, home to endangered and special-concern species of both flora and fauna. This clear-cut also opened a continuous closed high-canopy forest habitat to invasive species that now endanger the rest of the forest.
- Rinker Buck, a pilot and then-reporter for the Hartford Courant, was flying over Litchfield County when he noticed the inexplicable hole in the canopy of what he knew to be the state forest and wrote a piece for the paper in December 2010. BNE only reported the “mistake” to DEEP after it had received a call from Rinker Buck as he was preparing his story for the Hartford Courant. The 2.5 acre site is deep in the forest and not visible from roadways. Left in BNE’s wake, unremediated, was scarred earth and approximately 332 trees felled — some as large as 30 inches in diameter – randomly pushed into piles and left to rot on the forest floor. The appraised value of the 111 largest trees alone is well over \$1 million dollars as determined under the procedure of General Statutes §52-560a.
- Inspection by BLEC and its experts has already seen forage by deer and moose, the introduction of invasive plants, and large piles of rotting trees contributing to soil acidification – all factors that make it extremely difficult for the original tree species to regenerate. In addition to the trees, the area was a habitat for red and hoary bats, raptors and hawks, among others on the threatened list.
- DEEP did not send anyone to investigate until BLEC filed suit. Instead, DEEP signed a consent order with BNE, behind closed doors and without public comment, citing as authority for the settlement §52-560a! The consent order required BNE to pay for a survey and pay a contingent civil penalty of up to \$10,000 — and even that amount can be reduced if BNE finances a study of the environmental impact of cutting the trees. In essence, DEEP asked nothing of BNE.
- DEEP never properly investigated the facts concerning this timber trespass. Since starting the lawsuit we have been able to establish that no one ever interviewed the engineer who did the mark-out in the forest. No one ever asked basic questions like: “Which maps did you use? Who informed you of the property boundaries? Why did you

not call the abutting property owner? How is it that you strayed so far into the state forest? Or did you know a state forest was nearby?" Likewise, no one ever asked the machine operator any questions.

- DEEP has its own conservation police force but they were not sent to investigate. This is not a simple case of just negligently crossing the line. As BLEC's counsel has commented: "In 1968 I was an infantry platoon leader in Vietnam and we never had GPS then, but navigated with a hand-held compass and an old French map, and I never got this lost." All of the cutting occurred in the state forest. The first cut starts more than 200 yards south of the actual property boundary.

Conclusion:

In cases of egregious timber trespass and destruction of both public and private lands, BLEC would like to see stricter laws that require such cases be referred to the AG or state attorney and specifically away from DEEP for consent orders and/or litigation. What occurred in Canaan is the perfect example of what can unfortunately result from the combining of the former Department of Energy with the former Department of Environmental Protection into the DEEP entity, which now has an inherent conflict of interest with environment always potentially taking a backseat to energy. In the BLEC case, Commissioner Dan Esty was a strong proponent of wind energy such as the start-up BNE. (BNE's principals were also large contributors to Dan Esty's wife, Elizabeth Esty, in her campaign for U.S. Representative from the 5th Congressional District, which she won.)

We cannot allow any commissioner, now or in the future, to hold cards like that again. Too much is at stake. When timber trespass and destruction occur, these are potentially criminal cases and should be treated as such. If DEEP can issue consent orders with penalties so lax as to be no penalty at all, and never is obligated to inform/refer to the AG's office, there is simply no one truly protecting state assets. What happened on Canaan Mt is the poster child for this conflict and how it rolled out is the worst-case scenario of what happens when no one is minding the store.

Had the adoption of General Statutes § 52-560a been upheld as intended by this committee and legislators, BLEC would never have commenced legal action; BNE would have been properly addressed with far less than a slap on the wrist; and the forest might have been properly remediated as best it could, under the dreadful circumstances there. Most of those possibilities have now vanished.

The aim of BLEC's suit is to clarify any possible discrepancy in interpretation of the law. BLEC wants the AG's office to get these cases. BLEC is pushing for more effective government with fewer loopholes. HB 5710 needs to be tightened to accomplish those ends in order to truly protect our state assets against future encroachment, without adequate penalty and remediation. Thank you for the opportunity to address the committee.

Sincerely and Respectfully submitted,

Starling W. Childs, President, The Berkshire-Litchfield Environmental Council

B. Blake Levitt, Communications Director, The Berkshire-Litchfield Environmental Council