



Connecticut Department of  
**ENERGY &  
ENVIRONMENTAL  
PROTECTION**

**STATE OF CONNECTICUT  
DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION**

Public Hearing – March 18, 2016  
Judiciary Committee

Testimony Submitted by Commissioner Robert J. Klee

**Senate Bill No. 431 - AN ACT CONCERNING CONSENT ORDERS ENTERED INTO BY THE DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION**

Thank you for the opportunity to present testimony regarding **Senate Bill No. 431 – AN ACT CONCERNING CONSENT ORDERS ENTERED INTO BY THE DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION**. The Department of Energy and Environmental Protection (DEEP) welcomes the opportunity to offer the following testimony.

DEEP strongly opposes this bill. The Commissioner should retain the ability to revoke a consent order relating to remedial measures necessary to investigate, prevent, control or abate pollution. When a party enters into such an order, it accepts the order by consent, meaning it also accepts all of the Commissioner's statutory authority that accompanies it. It is not a contract; it is a final order of the Commissioner. A legislative proposal to amend section 22a-6dd of the general statutes—which DEEP believes is misplaced—would impinge on the Commissioner's authority and would severely limit the Commissioner's ability to ensure that public health and the environment are protected, especially in instances where previously undiscovered or undisclosed information has been uncovered. In addition, the bill should not have retroactive application and could wreak havoc on past real estate, insurance and/or financial transactions. Flexibility to assist the regulated community would also be negatively impacted if this bill were adopted.

This legislative proposal comes on the heels of a recent Superior Court decision. In *Commissioner v. BIC Corp.*, No. LND CV-11-6026501-S (Nov. 9, 2015, Berger, J.), the court determined that the DEEP Commissioner possessed the authority, pursuant to section 22a-424(f) of the general statutes, to revoke a consent order. In that case, DEEP first issued a unilateral order (which is the subject of a pending administrative proceeding), and later, DEEP and BIC Corporation (BIC) entered into a partial consent order. Under the partial consent order, BIC was required to investigate potential releases of environmental pollutants on its property, particularly releases of trichloroethylene (TCE). Revocation of the partial consent order occurred after the Commissioner had approved BIC's initial investigation and then was presented with facts that called into question the information submitted to DEEP by BIC. DEEP had previously instructed BIC to address what was seen as deficiencies and data gaps, which BIC refused to do. Consequently, the Commissioner took legal action against BIC to enforce the partial consent

order. Through documents received during the discovery phase of the court action, the reliability of BIC's investigation was again called into question. The Commissioner decided to revoke the partial consent order and undertake the investigation when he concluded that further investigation by BIC would not be constructive. BIC was not required to take on any new or different obligations as a result of the Commissioner's action.

Although the Commissioner's authority to revoke a consent order is a tool that is rarely utilized, its use was justified in the BIC matter. In fact, the State Board of Examiners of Environmental Professionals (LEP Board) later determined that two of BIC's consultants had violated a number of regulations in connection with the work they had performed on the BIC site at issue. These violations included failing to hold paramount the health, safety and welfare of the public and environment, failing to exercise reasonable care, diligence and professional judgment, and failing to make good faith and reasonable efforts to identify and obtain relevant data and other information evidencing conditions at the site. Although BIC's consultants denied that they had violated the law, they entered into consent orders with the LEP Board, in which they agreed to receive letters of reprimand and to take continuing education courses. One of the two consultants received ten (10) years of discipline which requires that his verification services be peer-reviewed by an independent LEP.

The Commissioner urges the rejection of this proposal which BIC is behind and in which BIC seeks to obtain an unfair advantage in ongoing litigation relating to a unilateral order that underlies the revoked partial consent order, and in which BIC will be able to have its concerns adjudicated. An administrative proceeding is still pending between the parties in regard to the unilateral order. Also pending is BIC's appeal of the court's decision concerning the revocation of the partial consent order.

Removing the power of the Commissioner to revoke an order limits the effectiveness of DEEP to fulfill its obligation to protect the environment. The statutory provision granting the Commissioner such authority is found at section 22a-424(f) of the general statutes. Yet, the proposed legislation to revoke such authority seeks to amend section 22a-6dd of the general statutes, a provision addressing potential changes in remediation standards following the adoption of a consent order. The two statutes operate in concert, not in contrast, as section 22a-424(f) of the general statutes relates to the overarching power and duties of the Commissioner, while section 22a-6dd of the general statutes reflects the more narrow issue of remediation standards. A proposed change of this manner would far expand the narrow intent of section 22a-6dd of the general statutes, while simultaneously failing to address the proper authorizing statute.

In addition, the proposed amendment would grant a party the ability to pursue declaratory and injunctive relief in Superior Court to resolve any dispute concerning the terms and conditions of, and compliance with, a consent order. Such a provision is unnecessary. A party who wishes to resolve such a dispute may already seek declaratory or injunctive relief through the Superior Court against the State, provided the party can meet the legal requirements to sustain such an action.

The proposed bill also seeks to make the proposed amendment to section 22a-6dd of the general statutes retroactive. This extreme and rarely undertaken action with Constitutional implications is inappropriate and could wreak havoc in regard to past real estate, insurance and/or financial transactions. For example, there are various sections of the general statutes, such as sections 22a-5c, 22a-178(g), 22a-225(e) and 22a-434, which require the filing on the land records of a certified copy of a final order issued by the Commissioner. These recordings provide fair and accurate notice of certain environmental conditions that are important to many real estate, insurance, and/or financial

transactions. The statutes also establish the framework by which these orders may be cleared from the land records. These orders may be cleared from the land records when an order is complied with or revoked, in which case, the Commissioner issues a certificate showing compliance or revocation. This certificate is then filed on the land records. Retroactive application of the proposed legislation could cause disruption in critical land records.

In summary, the Commissioner must have the discretion to revoke a previous consent order so as to ensure that public health and the environment are protected. This authority may be used in extraordinary circumstances, such as in instances involving previously undisclosed or undiscovered information, or in more ordinary circumstances, such as where a party to a consent order has passed away or a business entity has dissolved, in order to allow DEEP flexibility to remove regulatory hurdles for new property owners so long as public health and environmental objectives can be achieved. DEEP has revoked consent orders over the years due to requests from new owners, prospective purchasers and municipalities trying to promote brownfield reuse. For all these reasons, the Department strongly opposes Senate Bill 431.

Thank you for the opportunity to present testimony on this proposal. If you should require any additional information, please contact Robert LaFrance, DEEP's Director of Governmental Affairs, at 860.424.3401 or [Robert.LaFrance@ct.gov](mailto:Robert.LaFrance@ct.gov), or Elizabeth McAuliffe, DEEP Legislative Liaison, at 860.424.3458 or [Elizabeth.McAuliffe@ct.gov](mailto:Elizabeth.McAuliffe@ct.gov).