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**Testimony of Christopher P. McCormack, Esq.  
Connecticut Bar Association  
Environmental Law Section**

**in SUPPORT of**

**SB431, AAC Consent Orders Entered Into by the  
Department of Energy and Environmental Protection**

**Judiciary Committee  
March 18, 2016**

I am an attorney with Pullman & Comley LLC. My practice is concentrated in environmental law. I am currently Chair of the Environmental Section of the Connecticut Bar Association, a group of approximately two hundred attorneys including many with significant practices and experience in environmental law. In that capacity, I am here to express **the Section's support for SB 431, "An Act Concerning Consent Orders Entered Into by the Department of Energy and Environmental Protection."**

**SB 431 would clarify that DEEP cannot unilaterally revoke an administrative order that has been negotiated and issued with the consent of a regulated party. The Section's position is that this clarification serves the public interest.**

**Administrative orders on consent serve to memorialize negotiated compromises of controversies between DEEP and the regulated community, to their mutual benefit and to the benefit of Connecticut's environment. In such compromises, the regulated parties we represent often forgo the right to contest claims that could fairly be contested, and they make concessions and commitments regarding operations, environmental compliance and property investigation and remediation. Consent orders may also incorporate "supplemental environmental projects" and other undertakings that go beyond strict compliance, adding value that benefits the public and the environment generally. In exchange, settling parties bargain for and receive benefits from DEEP – at a minimum, resolution and predictability without the expense and uncertainty of a contested proceeding, but in many cases, also reciprocal compromises in their favor.**

**A recent Superior Court decision endorsed the view that DEEP has authority to revoke a negotiated administrative consent order unilaterally. See *Comm'r of Energy & Env'tl. Prot. v. BIC Corp.*, No. LND CV116026501S, 2015 WL 9310902 (Conn. Super. Ct. Nov. 9, 2015) (copy attached). The Court relied on the statutory authority of the DEEP Commissioner to "issue, modify or revoke" administrative orders, interpreting the lack of qualification on the term "order" to mean that there is no exception for negotiated administrative orders on consent.**



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**This interpretation does not appear to have been previously urged by the State or accepted by any court.** Many of the Section's members would respectfully dispute its correctness as a matter of law. At a minimum, however, **it is contrary to the general understanding of the negotiated consent order as a bilateral agreement in the nature of a contract, binding on and enforceable by both the Commissioner and the settling party.** In this regard, I would particularly direct the Committee's attention to footnote 6 of the Superior Court's decision in *BIC Corp.*, which articulates this understanding as a matter of law with citation to authority.

**The Section feels strongly as a matter of policy that a unilateral power of revocation on the part of DEEP would discourage parties from entering into consent orders, and therefore does not serve the public interest.** Negotiated resolutions conserve both public and private resources. Negotiated resolutions of environmental regulatory disputes in particular promote environmental protection and regulatory compliance, and in many instances include voluntary commitments that exceed the relief DEEP could obtain in a litigated resolution. **If DEEP has the unilateral right to "revoke" such a negotiated understanding, these benefits would be much more difficult to realize.** It would be much harder to justify making concessions, and perhaps harder to reach settlement at all.

**The novel concept of a unilateral right to revoke a negotiated order also presents a grave concern in relation to outstanding orders.** Commitments under such orders are often performed over a span of years. Disputes about implementation naturally arise from time to time, but as with any contract, the expectation is that the negotiated terms can be relied upon to resolve them – if not between the parties, then before an impartial court. **A unilateral right of revocation upsets this expectation by allowing one party to abrogate bargained-for terms.** The Section's position is therefore that a legislative clarification regarding revocation should apply to outstanding consent orders.

I want to stress that the Section's position is independent of the facts and circumstances presented in *BIC Corp.* The case merely presents the issue that is the subject of SB 431. As Section Chair, I have striven to focus consideration on the public policy of the matter. From that perspective, **it is strongly the sentiment of the Section that a unilateral power of revocation materially erodes the viability of the negotiated administrative order option.**

The Environmental Section of the Connecticut Bar Association therefore **supports** passage of SB 431.