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**IN RE: SB427 ENVIRONMENT COMMITTEE MARCH 12, 2018
AAC PUBLIC TRUST COMPONENTS OF THE STATE WATER PLAN**

TESTIMONY IN OPPOSITION

My name is Keith Ainsworth. I reside at 31 Green Springs Drive, Madison, Connecticut and am an environmental attorney with a New Haven office. I have been in private practice for 28 years and have been on the Executive Committee and past-chair of the Environmental Law section of the CT Bar Association. I am a former director of and Counsel to the Green Springs Water Company. I often represent individuals, businesses and organizations asserting claims to protect and conserve natural resources utilizing C.G.S. 22a-15, et seq.. I frequently lecture on environmental law. I am testifying solely on my own behalf without compensation.

I **OPPOSE** the bill now before your Committee which would run counter to science and reason. In opposition I state the following.

1) The Connecticut Environmental Act protects the public trust in natural resources including water, no matter where it is located. Private wells draw from groundwater which is not restricted to a single parcel. Draws from private wells can impact neighboring private wells and the recharge of surface waters (rivers, streams, ponds and lakes). This bill attempts to exempt a certain type of water (which is impossible), but instead exempts a device.

2)The exemption would rip a gaping loophole in water protection, since a person could draw from a private well until they had privately taken control of the surrounding water without being subject to private action. In addition, a person could inject harmful substances into a well and harm water resources and no longer be held accountable for damage done to the public trust which currently exists in water.

2) It's not scientifically possible to distinguish one part of groundwater from another part of groundwater. This bill is like saying: The water in the lake in front of your property

is in public trust, but because I have a well, the water in the lake is not in public trust as to me.

4) The term “private” wells is unrestricted and would include household wells, private water utility wellfields (e.g., Green Springs Water Company, Nestle and Connecticut Water), golf courses, factories, soda bottling companies, universities, nursing homes, condo associations. Water usage volumes would be unregulated except for governmental well fields.

5) The public trust principle, or doctrine, is foundational. Water is not a commodity that can be cornered by private entities. It is significant that during the formation of the draft Water Plan, the single most emphasized public comment was the following:

89% of the comments received (492 of 553) wanted the statewide water plan to emphasize public interest over private concerns. (Draft State Water Plan at p. 610)

6) Connecticut law has long recognized the special status of water and water resources and the wetlands which filter and produce our water. Under the Ninth Amendment to the U.S. Constitution there exists a public trust in the environment.¹

The public trust doctrine traditionally applied to tidal waters held in trust by the state for public benefit, but that has been expanded to all waters.²

Further, the General Assembly has already fought this hard won battle to protect water in Connecticut.

1. Conn.Gen.Stat. § 22a-1. Policy of the state. The General Assembly finds that the

¹ See, *Environmental Defense Fund v. Tennessee Valley Authority*, 458 F.2d 1164; 1972 U.S. App. LEXIS 6308; 4 ERC (BNA) 1850; 44 Oil & Gas Rep. 451; 2 ELR 20726 (6th Cir. 1972). In this case, three organizations and individuals asserted that they would be irreparably harmed if the Tennessee Valley Authority continued construction of the Tellico Project without filing an environmental impact statement as mandated under the National Environmental Policy Act (NEPA). The parties asserted standing under the Ninth Amendment, NEPA, Fifth Amendment and federal common law and the court found in their favor. See *Id.* at 1171.

² See, *Leydon v. Greenwich*, 257 Conn. 318, fn 17,(2001); *Mihalczo v. Woodmont*, 175 Conn. 535, 538, 400 A.2d 270 (1978); *Brower v. Wakeman*, 88 Conn. 8, 11, 89 A. 913 (1914); *Simons v. French*, 25 Conn. 346, 351 (1856)

growing population and expanding economy of the state have had a profound impact on the life-sustaining natural environment. **The air, water, land and other natural resources, taken for granted since the settlement of the state, are now recognized as finite and precious.** It is now understood that human activity must be guided by and in harmony with the system of relationships among the elements of nature. Therefore **the General Assembly hereby declares that the policy of the state of Connecticut is to conserve, improve and protect its natural resources and environment** and to control air, land and water pollution in order to enhance the health, safety and welfare of the people of the state. It shall further be the policy of the state to improve and coordinate the environmental plans, functions, powers and programs of the state, in cooperation with the federal government, regions, local governments, other public and private organizations and concerned individuals, and **to manage the basic resources of air, land and water to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations.**

(emphasis added)

CEPA GUARANTEES THE CITIZENRY A RIGHT TO PROTECT WATER

The concept of the public trust doctrine in water is an ancient one.³ Originally a creature of English common law, the doctrine dictates that all navigable waters (and the beds beneath them) belong to the crown. The sovereign, in turn, holds the beds and waters in trust for the public, with all citizens having access to and use of the common resource.⁴ CEPA is not just a policy act, it provides a legal right in every citizen to protect the public trust in the air, water and other natural resources.

Sec. 22a-15. Declaration of policy. It is hereby found and declared that there is a

³ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-74 (1988); *Adams v. Pease*, 2 Conn. at 483; *East Haven v. Hemingway*, 7 Conn. 186, 187 (1827).

⁴ See, AGO 2017-4 Connecticut Attorney General Opinions, May 8, 2017

public trust in the air, water and other natural resources of the state of Connecticut and that each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction.

The law is not ambiguous on this point. Water is a public trust resource which means it is the duty of the government and the right of the citizens to have a right and a remedy to protect water from unreasonable harm.

This remedy is further codified in yet another statute which ensures a legal right to protect the public trust in water:

Conn.Gen.Stat. §22a-16. Action for declaratory and equitable relief against unreasonable pollution. The Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business, except that where the state is the defendant, such action shall be brought in the judicial district of Hartford, for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction

The term "water" is not limited or qualified in any way. Water is such a fundamental need for the existence of life the law ensures the right to protect water wherever it may reside - in flowing streams, standing in ponds and swamps, marshes and lakes or residing in ageless bedrock aquifers.

Furthermore, for those people not well versed in Connecticut law, there exists federal legislation which recognizes the public trust in natural resources. The National Environmental Policy Act, 42 U.S.C §4331, et seq. makes the following declaration:

CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 [42 USC § 4331] (b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consist with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generation.

Corporations sometimes cloak their self-interest behind the fear of government intrusion into individual rights. The tail-wagging-the-dog aspect of such arguments aside, the law provides that no entity or person may unreasonably impair water resources. Mr. or Ms. John or Jane Q. Public may own their well and have the right to draw water from it, but they most certainly do not have the right to unreasonably impair that water and then discharge it into waterways, wetlands or other pure sources⁵. And a private owner may be reasonably restricted from drawing so much water that they impair the functioning of a neighbor's well or the surface recharge to a flowing stream.⁶

In other words, the declaration of the self-evident proposition that there exists a public trust in water does not necessarily lead to the loss of individual rights to reasonable use of the resource.⁷ It just means that the public will have a say in the extent and quality of that use.

Similarly, water companies declare that they have invested in water impoundments and infrastructure for water distribution and thus conclude that a statement of public trust

⁵ See, §22a-416 et seq, The Connecticut Water Pollution Control Act

⁶ *Tide Water Oil Sales Corp v. Shimelman*, 114 Conn. 182, 158 A.2d 229 (1932)(interference with natural flow of waters enjoined).

⁷ See for example, Conn.Gen.Stat § 26-141b which focuses on usage, not ownership, and directs the DEEP Commissioner to provide minimum stream flow regulations which are "consistent with the needs and requirements of public health, flood control, industry, public utilities, water supply, public safety, agriculture and other lawful uses of such waters."

will somehow rob them of that investment. Ignoring for the moment that water companies have been given the right to sell water and handsomely recoup their investments, the argument has a touch of arrogance to it - that is one invests a lot of money controlling a public resource that one then has an unfettered and vested right to exploit, degrade, overuse and consign it.

In conclusion, the declaration that water is a natural resource held - by whomever holds it - in trust for the public is a responsible communal way of saying firmly - "use, but use responsibly".

Water is and should remain a public trust resource and private owners of a pump should not be exempt from this fundamental concept.

The Committee should reject this bill for these reasons.