

Public Hearing - February 15, 2019
Environment Committee

Testimony Submitted by Commissioner-Designee Katie S. Dykes

House Bill No. 5185 – An Act Concerning Consent Orders Entered Into By the Department of Energy and Environmental Protection

Thank you for the opportunity to present testimony regarding House Bill No. 5185 – An Act Concerning Consent Orders Entered into by the Department of Energy and Environmental Protection (DEEP). The purpose of this bill is to limit the circumstances under which the Commissioner of Energy and Environmental Protection can unilaterally revoke consent orders.

DEEP **OPPOSES** this bill, just as it has opposed similar legislation in past years. DEEP takes very seriously the importance of allowing multiple procedural options to resolve enforcement cases in a manner that is fair, transparent, efficient, and affords flexibility to the parties involved. Consent orders are one option available to compliance entities to resolve an enforcement case. Compliance entities often pursue a consent order to obtain quick resolution of a case through negotiated terms (which can include penalties), thus avoiding the need for a unilateral administrative order, or referral to the Office of the Attorney General.

A consent order is not a contract; it is a final order of the Commissioner. When a party chooses to enter into such a consent order, it accepts the order by consent, meaning that it accepts the order subject to DEEP's discretion to exercise its revocation authority (detailed in the standard language of DEEP's consent orders).

DEEP believes there are important reasons to preserve the Commissioner's ability to revoke a consent order relating to remedial measures necessary to investigate, prevent, control or abate pollution. For example, when a party to a consent order has passed away or a business entity has dissolved, and a new or prospective property owner or municipality is trying to promote brownfield reuse, the inability to revoke a consent order can *prevent* DEEP from assisting in clearing a clouded title. This is by far the most common circumstance in which DEEP exercises its revocation authority. Ending DEEP's revocation authority would have the unintended consequence of thwarting economic development opportunities that could otherwise move forward once health and environmental objectives have been met.

Importantly, this legislation provides for declaratory and injunctive relief in Superior Court when disputes arise concerning consent orders. DEEP observes that this avenue already exists for those who can meet the legal requirements to sustain such an action.

DEEP appreciates that this proposal includes significant improvements over similar proposals from prior years. This legislation provides that: (1) the Commissioner has the authority to unilaterally revoke a consent order for a material breach or failure of a party to disclose material information; and (2) the language has prospective rather than retroactive applicability. DEEP appreciates the effort undertaken by the Environment Committee to improve upon the language,

and to allow unilateral revocation of a consent order when previously undisclosed information is discovered by the Department.

Nevertheless, DEEP still finds this legislative proposal objectionable. As stated above, there are legitimate, ordinary circumstances under which DEEP should have flexibility to revoke a consent order beyond a material breach or failure to disclose material information. Revoking a consent order is rare, but it is important that the Commissioner retain this authority. The Commissioner urges rejection of this legislation. DEEP continues to believe that amending section 22a-6dd of the general statutes is a mistake. The statute that provides the Commissioner with the authority to revoke an order is found in section 22a-424(f), while section 22a-6dd is remediation-focused.

Thank you for the opportunity to present testimony on this proposal. Should you have any questions, please do not hesitate to contact Mandi Careathers, the Department's legislative liaison, at Mandi.Careathers@ct.gov.