**Peter D. Van Oot**

**Testimony on H. 559**

**An act relating to potable water supplies from surface waters**

**House Committee on Fish, Wildlife and Water Resources**

**Thursday, April 21, 2016**

My name is Peter D. Van Oot. I am an environmental attorney and Director with Downs Rachlin Martin PLLC. I have practiced environmental law in Vermont for 29 years and been the primary counsel for landowners, manufacturers, utilities and municipalities at numerous Superfund Sites throughout New England including the following:

- Ely Mine Superfund Site, Vershire, Vermont
- Pike Hill Superfund Site, Corinth, Vermont
- Former Dover Manufactured Gas Plant Site, Dover, New Hampshire.
- Darling Hill and Parker Landfill Superfund Sites, Lyndon, Vermont
- Parker Landfill Site, Lyndon, Vermont
- Pine Street Canal Superfund Site in Burlington, Vermont
- Bennington Landfill Superfund and Kocher Drive Sites in Bennington, Vermont
- Pownal Tannery Superfund Site in Pownal, Vermont
- Elizabeth Mines Superfund Site in Stratford, Vermont
- Solvent Recovery Service of New England, Inc. Superfund Site in Southington, Connecticut
- Wells G&H Superfund Site in Woburn, Massachusetts

I have been appointed to numerous boards, commissions, advisory panels and task forces, and won a number of honors. I am a Charter Fellow of the American College of Environmental Attorneys (ACOEL), and was appointed to the Brownfields Task Force by Vermont Governor Shumlin to assist the Vermont Agency of Natural Resources and the Vermont Agency of Commerce and Community Development come up with new legislative approaches to Brownfield re-development, which led to the "safe harbor" protections for regional development corporations and planning commissions under 10 V.S.A. §6615 (d) (4).

I currently chair the Green Mountain Economic Development Corporation ("GMEDC") and Upper Valley Corporate Council Boards and serve on The Nature Conservancy -- Vermont Chapter Board. I have previously served on the Brownfields Advisory Committee to the Vermont Legislature, the advisory board of Vermont Law School's Environmental Law Center and Land Use Institute, and also served as a member of Vermont Governor Howard Dean's Council of Environmental Advisors and as a board member and chair of the Vermont Land Trust. He is a past visiting professor of environmental law at Williams College (1999-2003) and was a legislative aide to U.S. Senator Patrick J. Leahy in Washington (1980-1985).

Today I am testifying on behalf of the Lake Champlain Regional Chamber of Commerce and the Greater Burlington Industrial Corporation. My testimony will focus on Section 9 of H.595 – § 6615d. NATURAL RESOURCE DAMAGES; LIABILITY; RULEMAKING

Before I go into my specific comments on Section 9 of H.595, I would like to provide a quick overview of the liability scheme of Section 6615 of the Vermont Waste Management Act codified at 10 V.S.A. Ch. 159, (the "VWMA") which provides the premise for assessing natural resource damages under proposed Section 6615d.

Liability under the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by Superfund Amendments and Reauthorization Act of 1986, ("CERCLA"), 42 USC §§ 9601-9675 and the Vermont Waste Management Act ("VWMA"), 10 V.S.A. Ch.159, extends to the following "Potentially Responsible Parties" ("PRPs"):

- Present Owner or Operator of a Facility;
- Past Owner or Operator of a Facility at the time of a release of hazardous substances/materials
- So-called "Generators" or "Arrangers", i.e. person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances/materials owned or possessed by such

person, by any other person or entity, at any facility owned or operated by another person or entity and containing such hazardous substances/materials; and/or

- The Transporter who selects the disposal or treatment facility and transports such hazardous substances/materials to the facility.

.

CERCLA §107(a); VWMA §6615(a).

Liability under CERCLA and VWMA is strict, joint and several. Strict means that the regulatory authority, EPA or ANR, only has to find that a party falls into one of the above baskets of liable parties to bring an action to have that party remediate the site or potentially face treble damages. Joint and several means that a liable party is not only responsible for its proportional share of the costs of remediating but potentially all of such remediation costs, subject to their ability to seek and obtain contribution by other liable parties.

What this means in a nutshell is that a party may be strictly, jointly and severally liable for thousands or millions of dollars at a site where there has been a release of hazardous substances/materials; but not be **culpable** for the release or damage caused to the human health or the environment. Many of the Vermont landowners, manufacturers, utilities and municipalities that I have represented at federal Superfund and state hazardous waste sites over the last three decades have fallen into this category of legally liable, but not culpable, parties.

Here are a few quick examples:

- A major manufacturer that used the same acetone any of us can buy today at the Aubuchon Hardware on Main Street to lightly clean its manufacturing line. The manufacturer cleaned up the excess acetone and put it in 55 gallon barrels with non-toxic resin so that the acetone could evaporate, then disposed of the solid drums at state-licensed landfills which later became Superfund Sites. The minute amounts of acetone in the solid resin barrels caused the manufacturer to incur millions of dollars in cleanup costs to EPA and the State at two different National Priorities List ("NPL") or "Superfund" sites.

- A national timber company that purchased a large tract of timberlands adjacent to a mine in Vermont after having a Phase I ESA done that showed no contamination on their property. As the underground mine workings were subsequently found to extend underneath the timberland property, the company is in the process of negotiating settlement agreements with EPA and the State to resolve its liability. Because the mine operator that caused the release is a foreign entity and/or defunct, this company is the sole settling party at the site.
- A municipality that has incurred millions of dollars in liability costs to the EPA and the State relating to two different landfills it owned and operated; one of which was closed in 1968 but was the subject of testing for PFOA as recently as earlier this week; a second "sanitary" landfill that was owned and/or operated by the town from 1969 to 1975 and was listed as a federal Superfund site in 1996. The second landfill was **required by then applicable state law in 1983** to accept all liquid manufacturing wastes generated by its manufacturers and operated the landfill in full compliance with all state laws and regulations, yet still was held liable as an owner/operator under CERCLA and the VWMA. Significantly, that town was assessed natural resources damages relating to its landfill, notwithstanding no evidence that the town was in any way culpable for the damages.

The reason I provide these examples is not to rail against the unfairness of CERCLA and the VWMA' s liability scheme on non-culpable parties; but not point out that under proposed Section 6615d, all of these parties would now be responsible for natural resources damages – which potentially dwarf the total cleanup costs -- under the VWMA, as well as natural resources damages under CERCLA **and** cleanup costs under CERCLA and the VWMA.

If the legislature is interested in deterrence, I can assure you that there is plenty of effective deterrent measures under CERCLA and the VWMA. If the legislature wants to hold those responsible for causing natural resources damages to pay those damage, I suggest that the liability scheme of the VWMA is not the right, equitable or fair, vehicle to assess such damages.

Moving on to my specific comments on Section 9 of H.595, the first question the Legislature may want to ask is, with all of the pressing needs and limited resources available to address significant and complex environmental issues in Vermont, ***is the mammoth undertaking proposed in H.595 to give the ANR Secretary the power to assess natural resource damages under the VWMA and charge ANR to promulgate the necessary regulations necessary and warranted***?

Based on statistics provided by the *Ad-Hoc Industry Natural Resource Management Group* since the enactment of CERCLA in 1980 to the present, a total of approximately 800 NRD claims have been filed by federal and state trustees at the approximately 1328 NPL Sites as of April 12, 2016. Approximately 600 of these claims were brought under federal law or pursuant to a combination of federal and state law, and approximately 200 were brought under state law. At present, at least 100 federal NRD claims are pending—***some of which were initiated in the early 1980s***—**and an even greater number of state NRD cases are still pending**, in some cases decades after they were initiated.

NPL sites are designated as such only after exhaustive review and study as the most serious sites in the nation identified for long-term cleanup, yet only approximately 600 NRD claims have been filed by **federal and state trustees** at these 1300-plus NPL sites in the 36 years since CERCLA was enacted.

While I am not aware of any analyses as to why so few NRD claims have been filed at the most serious hazardous waste sites in the country, it would stand to reason that either the independent federal Natural Resource Trustees designated under CERCLA §107(f)(2)(A) -- the Department of Agriculture ("USDA"), Department of Commerce ("DOC"), Department of Defense ("DOD"), Department of Energy ("DOE") and, most often, the Department of the Interior ("DOI") – and designated State trustees did not feel that additional NRD claims were warranted or that bringing claims would be not be cost-effective in light of the extensive costs and time required under the CERCLA §107 and the comprehensive Department of Interior ("DOI") regulations that govern natural resource damages under CERCLA and the federal Oil Pollution

Act of 1990 ("OPA"), which are found at 43 CFR Part 11, Subparts A-F (the "DOI NRD Regulations").

Matt Chapman or others who work with or in the VTDEC Waste Management Division can correct me, but it appears that there are over 4500 sites on the VTDEC Hazardous Sites List. If only 600 NRD claims have been filed by **federal and state trustees** have been filed at the 1300 plus NPL sites in the 36 years since CERCLA was enacted, how many of the 4500 plus sites on the VTDEC Hazardous Sites List would warrant the extensive costs and time required under proposed 10 V.S.A. §6615d to pursue natural resources damages?

Note also that State Trustees – in Vermont, the Office of the Attorney General – as well as the above federal Trustees can bring NRD claims under CERCLA §107 at NPL sites; yet as far as I know to date the only NPL Site in Vermont where natural resources damages have been sought as justified under CERCLA is the Bennington Municipal Landfill Site, and there the damages were sought by the Federal Trustee – DOI's Fish & Wildlife Agency – not the State trustee.

The legislature and ANR may also want to consider the extensive rulemaking that would be required under Section 9 of H.595. While the DOI NRD Regulations found at 43 CFR Part 11, Subparts A-F are extensive, it apparently took DOI over a decade of struggle to promulgate its initial NRD Rules, which were premised on DOI's conclusion that the critical damage valuation question should be based on the on a principle of "the "lesser-of' rule" of compensation; i.e. that damages should be limited to the lesser of: (1) the costs of restoring or replacing the injured resources, or (2) the diminution in the resources' use value; which such rule was promptly set aside in Ohio v. United States Department of the Interior (*Ohio v. United States Dep't of the Interior*, 880 F.2d 432, 459 (D.C. Cir. 1989)) as inconsistent with the purposes of CERCLA, causing DOI to go back to the drawing board.

If any members of the Committee are interested in learning more, I am happy to provide you with my copy of Douglas R. Williams article, *Valuing Natural Environments: Compensation,*

*Market Norms, and the Idea of Public Goods*, from Volume 27 of the Connecticut Law Review at pages 366-491. Its good bedtime reading.

A further critical distinction between the assessment of natural resources damages under CERCLA and the OPA is that the federal government has vast and independent resources that allow EPA to investigate and remediate contaminated sites while, as necessary and appropriate, the federal Trustee, most often the Department of Fish & Wildlife at DOI, separately assesses and makes NRD claims. ANR does not have such vast resources, including teams of lawyers, to undertake **both** the investigation and remediation of contaminated sites **as well as** the independent and comprehensive assessment and implementation of NRD claims; **much less** promulgating the necessary and complex regulations.

Even if ANR successfully promulgates the extensive rulemaking proposed under Section 9 of H.595, there are, in my view, very serious problems with the authority granted to the ANR Secretary under the proposed bill.

First, as I discussed above, the Secretary may assess damages against ***any person found to be liable under section 6615 of this title*** for a release or threatened release of hazardous material for ***injury to, destruction of, or loss of natural resources from the release or threatened release***; which means that natural resources damages can be assessed against Vermont landowners, manufacturers, utilities and municipalities that may have already spent great sums of money to clean up contamination that they may not have caused; and then be liable for restoring natural resources they well may not have caused as well.

Second, it is not clear that ANR has the resources or time to determine whether there has been ***injury to, destruction of, or loss of natural resources from the subject release or threatened release***; much less make the extraordinary complex valuation of the natural resource "damages" -- which is defined as "**the amount of money sought by the Secretary for the injury, destruction, or loss of natural resources replacement cost**" under H.595 -- sought by the Secretary.

Even the terms within the terms of the key NRD definitions are problematic for ANR's rulemaking and implementation; for example, how will ANR, an agency that has been traditionally loath to engage in any risk-based methodologies or rulemaking with its current resources and expertise make the following determinations:

- That a "injury" to natural resources; i.e. "a ***measurable adverse long-term or short-term change in the chemical or physical quality or viability of a natural resource resulting either directly or indirectly from exposure to a release of hazardous material or exposure to a product of reactions from a release of hazardous materials*** has occurred?

- That the "destruction" of natural resources; i.e., "***the total and irreversible loss of natural resources***" has occurred?

- That there has been a "loss" of natural resources; i.e. "***a measurable adverse reaction of a chemical or physical quality of viability of fish, wildlife, biota, air, surface water, groundwater, wetlands, drinking water supplies, or State-held public lands***?

Further, at the core of Section 9 of H.595 is the presumption that ANR is able to make an initial determination of the "baseline condition" of the subject natural resource(s); i.e. "***the condition or conditions that would have existed at the area of assessed damages had the release of hazardous material not occurred***; much less a comprehensive and complete "natural resource damage assessment, i.e. " "***the process of collecting, compiling, and analyzing information, statistics, or data through prescribed methodologies to determine the damages for injuries to natural resources***" that would stand up in court upon very likely appeal.

The NRD claims imposed by DOI at the Bennington Municipal Sanitary Landfill site I referenced earlier in this testimony are illustrative of the problems even sophisticated and experienced federal agencies have in this area. At the Bennington NPL Site, DOI, as a condition of signing off on the Consent Decree negotiated over several years by the potentially responsible

parties, including the Town of Bennington and a number of Vermont manufactures, EPA and the State; required that the PRPs "compensate [DOI] for injuries" to the following primary "Trust Resources": the "***Drainage Pond***", a pond located east and down gradient of the landfill approximately 0.10 acres in size and "***Pond B***" a smaller pond located approximately 300 feet southeast and east of the Drainage Pond; both of which were man-made excavations that were dug in the former gravel pit that became the site of the state-licensed and approved "sanitary landfill." In addition to the requirement that the PRPs acquire, monitor, conserve and oversee replacement wetlands to compensate for the "injury" to the "Drainage Pond" and "Pond B"; DOI also required that the PRPS pay it $33,600 for its coordination, monitoring and assessment costs."

Thank you for the opportunity to express my views on this important legislation. I am happy to answer any questions you may have.

16644864.1