Testimony of Jon Groveman, Policy and Water Program Director, Vermont Natural Resources Council (VNRC) on S.197
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For the record, my name is Jon Groveman. I am the Policy and Water Program Director for VNRC. VNRC is Vermont's oldest statewide environmental advocacy group. We were formed in 1963 by Vermonters seeking to foster sustainable communities, working lands, and clean water. We have over 3,000 dues paying members and more than 4,000 activists throughout Vermont.

Thank you for this opportunity to testify on S.197. As I will discuss, S.197 is a bill that was born out of Vermont's evaluation of the gaps in law and policy that govern toxic pollution following the discovery of high levels of PFOA in wells in Bennington in 2016. As I will discuss today, S.197 is an important bill that creates greater fairness for Vermonters harmed by releases of toxic substances.

Before discussing the substance of the bill I would like to convey a little about my background and what my testimony is based on.

My testimony today is based, in part, on my work on the Act 154 Chemical Use Working Group in 2017 that investigated these gaps in Vermont's toxic laws and policies that I previously referenced, my current work on the Interagency Committee on Chemical Management (ICCM) Citizens Advisory Panel (CAP), and my experience as ANR General Counsel.

In addition, my testimony is informed by my work as a professor at Norwich University where I teach a class in Environmental Law, which includes a unit on liability for the release of toxic chemicals and hazardous waste.

Act 154 Chemical Use Working Group

I would like to begin by discussing the Act 154 Chemical Use Working Group. The Act 154 Chemical Use Working Group was established in Act 154 of 2016 as part of a bill to begin to address the harm caused by the release of PFOA in Bennington.

The Working Group met for the first time in July of 2016. The group was compromised of 20 members. Of these 20 members, 14 members represented businesses, state agencies, or academic institutions. The group met 8 times. The final meeting was held in January 2017. A majority of the group recommended that strict liability be adopted for harm caused by the release of toxic chemicals and that a claim for medical monitoring be established in Vermont.

I submit the final report of the Working Group to this Committee for your review. The report details the extensive background research on the issues before the Working Group that was conducted by ANR staff. The report also includes a summary of the discussion and

analysis members of the Working Group engaged in to identify gaps in our laws that address toxic chemicals in Vermont.

You are likely to hear testimony from members of the Working Group who did not vote for the strict liability and medical monitoring proposals that the Working Group recommendations should be afforded limited weight. I believe the Committee will see when it reviews the report that the recommendations are well founded and represent a good jumping off point for the provisions of S.197 that are before you.

Adopting Strict Liability for Toxic Harm

After the Act 154 Working Group completed its work, VNRC approached Vermont Law School (VLS), which was represented on the Working Group, about further researching the liability standard for harm caused by toxic releases and whether Vermont should create a cause of action for medical monitoring resulting from toxic pollution. As a result of these discussions, VLS prepared a White Paper outlining these issues. I submit to the Committee a copy of this White Paper.

Professor Ken Rumelt, the main author of the White Paper, is scheduled to testify today on S.197. Accordingly, Mr. Rumelt will review the findings on his White Paper with you. However, I would like to highlight a few key aspects of the White Paper to set the context for the Committee's consideration of S.197.

As the VLS White Paper notes, strict liability is not a new concept generally or in Vermont. Under Vermont's Solid Waste Management Law, polluters are currently strictly liable for "all cleanup, removal, and remedial costs" associated with a release of hazardous materials into the environment. Thus, the State can recover toxic clean up costs without establishing negligence.

S. 197 would simply afford Vermonters the same benefit when seeking compensation for loss in property values, adverse health impacts, and related private economic harms. Like with property contamination, S.197 would allow Vermonters to recover for these harms without having to establish negligence.

I think it is instructive to look at the history of strict liability to determine whether applying it to toxic pollution that affects health and property damage is consistent with our jurisprudence surrounding civil liability.

Strict liability dates back to the English common law[1] case of *Rylands v. Fletcher*, where a landowner built a pond on his property that breached abandoned mineshafts and flooded a neighboring property. The court held that the landowner was not negligent in constructing his pond, but would be nevertheless be held liable for the damage his actions caused.[2] The

[1] The term "common law" refers to the "body of law derived from judicial decisions, rather than from statutes or constitutions." *Common Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[2] Rylands v. Fletcher [1868] 3 LRE & I. App. (H.L.) 330 (appeal taken from Eng.).

English common law rule that developed from this and later cases is "that the defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings."[3]

Some American courts have described the justification for strict liability as: "When one enters into a business or activity for his own benefit, and that benefit results in harm to others, the party should bear the responsibility for that harm."[4] As another scholar stated: "The central issue is whether the victim can avoid the harm by adopting suitable precautions. If not, the injurer is strictly liable."[5]

The renowned torts scholar William Prosser wrote that strict liability helps resolve inevitable harms from modern society by placing liability "upon the party best able to shoulder it."[6]

In modern times, strict liability, has been applied to cases involving what have been characterized as"ultra-hazardous" activities like blasting, keeping animals (dog bites in most states are subject to strict liability, including in Massachusetts) and products liability.

I submit that applying strict liability to harm caused by the release of toxic chemicals is entirely consistent with the doctrine of strict liability in common law and how it is currently applied.

Toxic chemicals are inherently dangerous substances (like flammable substances, certain products and certainly dogs). They have the potential to cause significant harm if released into the environment in sufficient quantities, as we saw in Bennington with the release of PFOA.

In the same way that certain products pose and inherent danger, and keeping animals involves inherent risks, making a decision to use known toxic substances means that the user is assuming risks.

All strict liability does is say that when significant releases of toxic substances occur, and it can be proven in a court of law that the release caused the harm, the entity that released the toxic substance and caused the harm will be held responsible.

Under existing law, the way this system works is that even if an entity released toxic chemicals, and caused harm, the entity could escape liability by arguing they followed rules, permits or industry standards. In other words, the entity can argue that it should not

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[3] PROSSER & KEETON ON TORTS § 78, at 547–48 (W. Keeton 5th ed. 1984).

[4] Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 330 (2d Cir. 2000) (quoting United States v. FMC Corp., 572 F.2d 902, 907 (2d Cir. 1978)).

[5] William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1778 (1992).

[6] W. Prosser, HANDBOOK OF THE LAW OF TORTS 318 (2d ed. 1955).

be held responsible because they are not negligent – that even though the entity caused the harm, because they did not violate a "duty of care," they should be let off the hook.

What S.197 does is to remove negligence from the liability analysis and say if you cause the harm, the burden of paying to address the harm caused should be on you and not those who have suffered illness, property damage or both.

What VNRC has learned through studying this issue is when there is a significant release of toxic substances that causes harm, someone always pays. The current system is designed to place the burden to address harm caused by these releases on innocent victims by allowing polluters to avoid liability by claiming they were not negligent.

In our view, the current system is inherently unfair. I would ask that the Committee think about this issue in this way: If an entity harms a Vermonter through the release of toxic chemicals, and is not liable because the entity complied with a permit or industry standards and thus was not negligent, who should be responsible for causing this harm? Who should be responsible for paying for the medicals costs incurred by the person harmed? For property damage? Should the person who is harmed have to bear these costs? Should the State of Vermont pay these costs? Or should the entity that has been profiting off the use of the chemicals that caused the harm shoulder the responsibility, regardless of whether the entity complied with a permit, or complied with industry practices in a manner that met their "duty of care?"

Creating Fairness

Entities have the right to use toxic substances. However, strict liability would recognize the risk associated with these chemicals and take a small step toward creating more fairness in apportioning responsibility for harm cause by the release of toxics.

I say a small step to creating more fairness because even if S.197 is enacted, and strict liability is applied to harm caused by toxic releases, the playing field will still be significantly tilted in favor of entities that release toxic chemicals into the environment. Why doesn't strict liability level the playing field, or tilt it in favor of Vermonters harmed by toxic pollution? For two main reasons:

1. Even if strict liability is applied to harm caused by toxics, a Vermonter must prove that the release caused them harm and that the harm is so significant that it warrants damages. These are no small things. For example, Saint Gobain in Bennington is contesting that they released the PFOA that caused many of the damages to the residents of Bennington. There will be significant litigation on this issue of causation in Bennington that would not be altered in any way by S.197. However, if causation is established, the people of Bennington *would* not have the additional burden to prove that Saint Gobain violated a duty of care, if S.197 was enacted. Note, I say would because the bill is not retroactive - it will not apply to the claims already filed in Bennington – but it will help Vermonters who file claims after the bill is –hopefully – passed.

2. Even if causation is established a person must be sufficiently harmed to justify a lawsuit. People will not file lawsuits because they were exposed to small amounts of a toxic substance. Litigation is no fun, especially against well-resourced corporate entities with access to teams of attorneys. Litigation is a last resort that people will pursue only if their harm is so significant they have no other choice. Simply applying strict liability to harm caused by toxic chemicals will not lead to baseless lawsuits against any person who uses a chemical. You still need prove causation. You still need to prove damages. As previously noted, S.197 would create public policy that would turn the dial, for the first time, towards Vermonters harmed by toxic chemicals. However, any Vermonter seeking to be made whole as a result of toxic contamination will still be fighting an uphill battle.

Ultimately, policymakers must decide whether the law should require innocent victims of toxic pollution to bear some or all of the costs; or instead, whether those who profit from toxic chemicals, and are in the best position to prevent contamination, should bear those costs.

Arguments Against Strict Liability for Toxic Pollution

I would like to address some of the arguments you will likely hear about why Vermont should not adopt a strict liability standard for toxic pollution:

Permit Compliance

In the Senate, the argument was made that it is unfair to hold an entity liable for harm caused by a toxic release if an entity has a permit and complies with the permit. It was represented that going to strict liability for the limited purpose of addressing toxic pollution would render these permits meaningless and be tantamount to changing the rules in the middle of the game. There are multiple responses to these arguments.

First, it is important to note that environmental statutes often do not fully protect human health. The VLS White Paper covers this issue in depth, but suffice it to say for now that environmental regulations and permit processes are not as stringent as possible. Regulations and permitting requirements are usually the result of compromise between regulators, the regulated community and other interested parties. Typically, the regulated industries argue for less stringent and less costly regulations. It hardly seems fair that industries should be allowed to argue for less stringent regulations and permit requirements on the front end and then argue that compliance with these less than fully protective regulations should be used to escape liability if a toxic release occurs and causes harm.

The Bennington PFOA release is a good example of why permit compliance should not be used to avoid responsibility for harm caused by toxic releases. In the Bennington case, the company, Chem Fab (Saint Gobain purchased the plant from Chem Fab) was in full compliance with its permits. Residents complained about odors from the plant, and ANR

determined there was no permit violation. When the PFOA contamination was discovered in Bennington, ANR's investigation indicated that it likely came from PFOA being deposited in the soil and groundwater through the facilities air emissions. So even though Chem Fab was in compliance with its air permit, it caused major harm to the residents of Bennington. Is it fair to allow Chem Fab to use its permit compliance to avoid responsibility for the harm it caused?

This example raises the fairness issue I discussed before. Again, someone always pays. Should permit compliance allow an entity not to pay, even when it caused harm, and shift that burden on to the innocent victims of contamination?

Also of note is that currently, permit compliance is not an automatic shield against liability. Permit compliance is a defense that can be raised to avoid a finding of negligence, but having a permit cannot be used to dismiss a liability claim.
The fact that a permit is not an automatic shield is evidence that S.197 would not change the rules in the middle of the game. Entities that use toxic substances understand now that permit compliance may not shield them from liability, and they assume the risks associated with using dangerous chemicals.

Insurance Issues

In the Senate, we heard arguments that S.197 would increase insurance rates and generally have an adverse effect on the insurance market.

No evidence was submitted that proves S.197 will have this effect. The argument, as I understand it, is because other states have not applied strict liability to toxic pollution in the same way S.197 does, there is concern that insurance companies will exclude coverage for harm caused by toxic pollution and increase rates. No evidence was provided that this would happen. The issue was framed as a concern.

There are several responses to this concern. First, as noted, strict liability already exists in certain circumstances and the insurance market has not collapsed throughout the country. For example, when the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Superfund program went into place in 1980, it was much further reaching that S.197. CERCLA applied to any sites contaminated by hazardous waste, and was retroactive. Under CERCLA, past, present and current owners, operators, transporters and arrangers of thousands of hazardous sites that existed for decades were made strictly liable for the clean up of these sites. My research indicates that initially insurance companies did develop pollution exclusions based on CERCLA claims. However, the response to these exclusions appears to be that state insurance regulators developed riders to cover contaminated sites.

Almost 40 years after CERCLA passed, there is no evidence I have seen that applying strict liability to contaminated sites retroactively has driven companies out of business or made it impossible for these companies to operate and obtain insurance.

My research further indicates that the main variable that effects insurance rates is not the liability standard – strict liability or negligence – but the number of claims that are filed. If insurance companies see a significant increase in claims, they are likely to evaluate their policies and coverage for the activities leading to the claims.

As I noted earlier, S.197 will not lead to a flood of toxic liability claims. Even with the strict liability standard, as I noted, it will be difficult for ordinary Vermonters to go up against large companies and chemical companies. In Vermont, juries are famously stingy and conservative and Vermonters tend to seek relief in courts as a last resort, only if the harm is so significant that it has caused serious illness and property damage like we have seen in Bennington.

I submit that enacting a strict liability standard will not increase claims. What it will do is create slightly more fairness for Vermonters to be able to recover for harm caused to them if a claim is brought.

A couple of other points – in states where there is strict liability for dog bites, people are able to obtain insurance.

There is strict liability for transporting certain toxic substances, and these industries exist and are profitable.

The argument has been made that a strict liability law in New York for scaffolding has had adverse effects on business and insurance companies. I would like to provide a comment from New York Law School on attempts to change this law that indicates the law is fair and should not be changed.

Finally, the Senate took steps to address concerns about potential impacts on the insurance market by requiring a report back from state insurance regulators on whether enacting strict liability for toxic pollution will have adverse effects. In the absence of specific evidence that these impacts will occur, this is a prudent approach to dealing with this issue.

Individuals and Homeowners

Arguments have been made that while the focus of S.197 is on toxic pollution from larger companies, it will unfairly expose individuals and homeowners to liability.

The main response to these concerns is that the Senate made changes to S.197 as the bill moved through the process to protect homeowners and individuals.

For example, S.197 was amended by the Senate Judiciary to include minimum thresholds of chemicals that must be released to trigger strict liability being applied. The intent of creating these minimum thresholds is to ensure that individuals or homeowners that spill small amounts of toxic substances will not be strict liable for the release of these substances.

In my opinion, these small releases of chemicals would not cause sufficient harm to warrant lawsuits for the reasons I previously discussed.

In addition, the universe of chemicals that trigger strict liability in S.197 was significantly narrowed by the Senate Judiciary Committee as part of its review of the bill. As introduced, S.197 applied to "any substance identified as toxic or hazardous under State or federal law, or mixture thereof, *or any other substance that has been shown at any time to cause increased risk of disease*."

The definition of toxic substance was changed to be a substance on a government list of dangerous toxics or a toxic determined by the state or federal government as being dangerous.

This was a significant narrowing of the applicability of the bill that VNRC opposed. VNRC favored this broad definition because there are often chemicals not on government lists that are harmful and harm people and the environment. PFOA is a good example of this.

Medical Monitoring

The medical monitoring provisions of the bill simply clarify that Vermonters can seek relief through the courts for medical visits as a result of toxic contamination, before a disease manifests itself.

Vermonters in Bennington are dealing with this very issue. They have high levels of PFOA in their bodies and are being monitored for whether these high levels result in a disease. It is currently not clear in Vermont if these Vermonters can sue for medical monitoring costs before they get sick. S.197 would remedy this.