Testimony of Jon Groveman, Policy and Water Program Director, Vermont Natural Resources Council on S.197
January 31, 2018

Thank you for this opportunity to testify again on S.197. In my initial testimony on S.197 two weeks ago, I introduced a White Paper that the Vermont Law School (VLS) prepared on applying strict liability to releases of toxic chemicals that cause significant harm to people and property in Vermont and creating a cause of action for medical monitoring costs incurred as a result of toxic contamination. Professor Ken Rumelt of VLS, the primary author of the White Paper, reviewed his research and conclusions with the Committee.

Last week and today, the Committee heard testimony from witnesses opposed to the bill who raised concerns about the scope of the bill, the impact of the bill on business and, what I believe are hyperbolic claims, of how S.197 would alter the fundamental application of liability to harm caused by the release of toxic chemicals by courts. I appreciate the opportunity to address these arguments.

My testimony is based on the analysis of gaps in regulation of toxic substances in Vermont that has occurred since the discovery of high levels of PFOA in wells in Bennington in 2016, my work on the Act 154 Chemical Use Working Group in 2017 that investigated these gaps, 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.

The following is my response to testimony you have heard:

Act 154 Chemical Use Working Group Process was Not Flawed

The Act 154 Chemical Use 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 the 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 believe the work of the Chemical Use Working Group speaks for itself. I previously submitted the final report of the Working Group to this Committee. 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. As a member of the Working Group I am insulted by the claim that the work of the Group was not meaningful and should be discounted.

Adopting Strict Liability for Toxic Harm Would be Not be a Radical Shift in the Jurisprudence of Civil Liability

The Committee has heard testimony that the application of strict liability to releases of toxic substances that cause significant harm would be a radical shift in how courts allocate responsibility in civil suits. This is not accurate.

I fully understand why representatives of certain businesses and the insurance industry would oppose the provisions of S.197 that would increase the risk that their clients would be found liable for harm caused by toxic releases. However to say the strict liability provisions of S.197 represent a major shift in jurisprudence is hyperbolic at best.

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

Let's look at the history of strict liability to determine whether applying it to toxic pollution is a significant departure from our jurisprudence around 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 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 differently: "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]

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[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.).

[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).

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] Despite the powerful justifications and rationales for imposing strict liability, courts have largely limited its application to cases involving "ultra-hazardous" activities like blasting, keeping dangerous animals, and (arguably) products liability.[7]

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 the analysis of strict liability by legal scholars like Prosser. Toxic chemicals are inherently dangerous substances. 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.

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 harmed by toxics 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 will not have the additional burden to prove that Saint Gobain violated a duty of care, if S.197 is enacted.

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 vapors from filling a gas can for their lawn equipment. 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 towards

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

[7] Martin v. Christman, 99 A.3d 1008, ¶10–11 (Vt. 2014) (explaining that while products liability may be considered "strict liability," it still requires some showing that the product was "deficient or unsafe").

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.

If Polluters Comply with Existing Permits it is Not Unfair to Make them Liable for Harm Caused by the Release of Toxic Chemicals

Environmental statutes often do not fully protect human health. For example, both the Clean Air Act and Clean Water Act require the Environmental Protection Agency ("EPA") to consider costs when setting certain pollution control standards.[8] These requirements represent a conscious decision by policymakers to accept additional human health and environmental risks. Indeed, "many statutes are written in response to lobbying efforts of the industry they purport to regulate, and they are not likely to represent a balanced attempt by neutral parties to achieve appropriate safety."[9]

Even regulations that fully protect human health and the environment may be delayed, sometimes by a decade or more. At the federal level, environmental regulations undergo a lengthy rulemaking process, often followed by litigation that can invalidate the rule or remand it to the agency for additional study.[10] Insufficient scientific evidence can also delay the rollout of effective standards. This lack of information may result from failures of environmental law[11] or, in some cases apparently by efforts of chemical manufacturers to withhold important information from public review.[12] Whether well intentioned or not, delays in implementing regulations can leave generations unprotected.

Similarly, permit requirements may be outdated, not take into consideration best available scientific information or not be sufficient to protect public health and the environment. If an entity has a permit, complies with a permit, but still releases toxic chemicals in sufficient

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[8] *See, e.g.*, Clean Air Act § 112(d)(2), 42 U.S.C. § 7412(d)(2) (1999) (requiring EPA to consider the "cost of achieving such emission reduction" when setting initial emission standards for hazardous air pollutants); Clean Water Act § 307(a)(2), 33 U.S.C. § 1317(a)(2) (1987) (requiring the "best available technology economically achievable" for toxic pollutants).

[9] DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 249 (2d ed. 2016).

[10] For example, the asbestos industry successfully challenged the EPA's rule prohibiting the manufacture, importation, processing, and distribution of asbestos in most products. Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1206, 1229–30 (5th Cir. 1991). EPA had taken 10 years to reach its conclusion under the Toxic Substances Control Act ("TSCA") only to have the regulations overturned. *Id.* at 1229.

[11] Congress recently amended TSCA to address concerns that it hamstrung EPA's authority to obtain scientific information on chemicals. Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, § 1, 130 Stat. 448 (2016).

[12] *See e.g.*, Sharon Lerner, *The Teflon Toxin: DuPont and the Chemistry of Deception*, THE INTERCEPT (Aug. 11, 2015), https://theintercept.com/2015/08/11/dupont-chemistry-deception/.

quantities to harm Vermonters so significantly as to justify a lawsuit, S.197 says permit compliance cannot be used as a shield to escape liability.

Let's turn this question around. If an entity harms a Vermonter through the release of toxic chemicals, and is not liable because the entity complied with a permit 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?

It is worth noting that under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Superfund program, and the companion state program in Vermont, permit compliance is not a defense to being responsible for cleaning up a contaminated site. As noted above, CERCLA at the federal level, and Vermont's version of the statute, applies strict liability.

Medical Monitoring and Requests to Narrow the Scope of Strict Liability

The concerns regarding the medical monitoring provisions of S.197 relate to the definition of "disease" and "exposure" that could trigger a medical monitoring claim. There were also concerns raised about the how medical monitoring payments would be made.

VNRC would be happy to review any specific changes to language that any stakeholder proposes to address these concerns. However, our position is that the definitions as set out in S.197 are appropriate. We believe that the courts are in the best position to decide when and the extent of medical monitoring damages that should be awarded based on the facts and circumstances of a particular case. As noted above, lawsuits are not undertaken lightly. Vermonters will only seek medical monitoring damages when a medical expert can document that toxic exposure at certain levels can lead to a disease. The medical expert will have to prove these elements in a court of law.

VNRC has the same position with regard to the language in the strict liability section of S.197. As noted, VNRC's position is that because under S.197 a plaintiff would be required to prove causation and damages, this would discourage lawsuits that do not have merit. In addition, like with medical monitoring, we believe the courts will be in the best position to determine causation and damages related in the context of harm from the release of toxic chemicals on a case-by-case basis. However, if stakeholders have suggested language changes to address their concerns about the bill we would like the opportunity to review them.