

Testimony of Emily Joselson, Esq. in Support of S.37 (4/10/19)

My name is Emily Joselson. I graduated from Harvard Law School in 1982, and moved to Vermont to clerk for then Chief Justice Franklin S. Billings, Jr., of the Vermont Supreme Court. After my clerkship I joined the law firm of Langrock Sperry & Wool, LLP, with whom I have been a partner since 1988.

During my 35 years of practice in Vermont, I have represented many “ordinary Vermonters” in suits against their corporate industrial neighbors, who have operated in ways that release toxic contaminants that leave their industrial properties and travel onto the residential properties of their neighbors. Some of these cases include the following:

- Representing Vermont lakefront property owners in Addison, Bridport and Shoreham, for air and water contamination with industrial solvents from International Paper Co., Inc., in Ticonderoga, NY;
- Representing Williamstown residents in a suit against industrial dry cleaner Uni-First Corp., for Trichloroethylene (TCE) contamination;
- Representing residents in Pittsfield, MA, and Ft. Edward, NY, in suits against General Electric Corp., for its industrial operations involving PCBs (in Pittsfield) and TCE (in Ft. Edward).

I am now part of the legal team representing folks in Bennington and North Bennington, Vermont, suing Saint-Gobain Performance Plastics Corp. (SGPP), formerly ChemFab Corporation, for emitting thousands of pounds of Perfluorooctanoic acid (PFOA) out of its industrial stacks during its 30-plus years of operation there. As a result of its uncontrolled air emissions of PFOA and related chemicals, hundreds of private drinking water wells have been contaminated, and thousands of individuals, having unknowingly consumed their contaminated water for decades, now have significantly above-background levels of PFOA in their blood serum (according to testing by the Vermont Department of Health (VDOH)).

History of PFOA Contamination in Bennington Area

SGPP/ChemFab operated in Vermont from 1968 to 2001. SGPP purchased ChemFab in 1999, and in 2001, under increasing pressure from Vermont’s Agency of Natural Resources, Department of Environmental Conservation (VANR/VDEC) to control its industrial air emissions, SGPP chose instead to close its remaining plant in North Bennington and move all its equipment, and jobs, to Merrimack, NH. Although the company knew, almost from the time it commenced operations in Vermont, that its air emissions were noxious, it did not effect changes in their industrial processes sufficient to contain their emissions. At least by 2001, after the company left Vermont for New Hampshire, it learned that PFOA was toxic, and that its historical emissions in Vermont were likely to have caused widespread groundwater contamination, the company never notified VANR, nor officials in the Bennington area, of these facts. Thus, innocent Vermonters continued to drink the PFOA contaminated water for decades.

Vermont first discovered the wide-spread PFOA contamination SGPP left behind in the Bennington area in the Spring of 2016, after a local resident learned of PFOA contamination in Hoosick Falls, NY, and asked VDEC to conduct testing in Vermont. Over the course of several months, VDEC tested wells in an increasingly wide radius from the former SGPP plants, ultimately documenting a several mile wide zone of PFOA contamination. *See* Map, dated 8/15/17.

Since that time VANR has been negotiating with SGPP to take responsibility for the PFOA contamination. Such widespread PFOA contamination cannot be removed or remediated. Instead, residences with contaminated wells were first provided with filtration systems (called point-of-entry-treatment systems, or POETs), and with bottled water, and the State negotiated with SGPP to pay the cost of extending municipal water lines throughout the contamination zone. In the Summer of 2017, SGPP took responsibility for extending municipal water lines in the western side of the zone. *See* blue area on Map. In January 2019, the State announced an agreement “in principle” with SGPP to extend water lines in areas on the eastern side of the zone. *See* yellow area on Map. In addition, the State has required SGPP to pay for a thorough investigation of the entire zone, and to do some additional remediation projects, as well. The State has estimated SGPP’s costs to perform all this work will be well over \$50 million, in all.

However, while many (not all) of those Bennington area residents with contaminated wells will ultimately be connected to municipal water line extensions, the State’s settlements with SGPP do not compensate these injured Vermonters for most of their losses. Claims for their diminished property values, or for the excessive levels of PFOA in their blood serum, which put them at increased risks of developing adverse health conditions known to be associated with PFOA contamination, must be addressed in private litigation against SGPP. This is what the pending class action suit seeks to remedy.

Practical Limitations on Regulatory Oversight

Ironically, one of SGPP’s arguments in our class action suit has been that its conduct “wasn’t so bad,” as evidenced by the fact that VDEC/VANR never shut them down, and never imposed excessive fines (the largest fine imposed during SGPP/ChemFab’s years of Vermont operations was \$2,500). This argument sheds light on the shortcomings in our regulatory system, and the need for the legal protections contained in S. 37.

The PFOA chemicals SGPP/ChemFab used over their decades of operation in Vermont were purchased primarily from DuPont and 3M (and others). 3M developed PFOA in 1947, as a means of keeping coatings like Teflon from clumping during production, and in 1951, DuPont started purchasing PFOA from 3M for its production of Teflon-related products. For the next 40 years, 3M and DuPont conducted in-house studies of the toxicity of PFOA, but kept these studies secret.

In 1976, the federal government passed the Toxic Substances Control Act (TSCA). TSCA regulates the introduction of new or already existing chemicals that pose an “unreasonable risk to health or to the environment.” However, the mechanism for regulation under TSCA requires the *manufacturers* of those chemicals to notify the U.S. Environmental Protection Agency (EPA) of a new chemical’s toxicity. Not surprisingly, many chemical companies choose not to notify the

EPA of this fact, and this was the case with 3M and DuPont with regard to PFOA. Therefore, the EPA was not aware of PFOA, or its toxicity, for many decades.

In fact, it was not until early 2000, when neighboring property owners filed a private lawsuit against DuPont in Parkersburg, West Virginia, and a cache of documents was finally produced in that litigation, that the full extent of the companies' knowledge of PFOA's toxicity was discovered. In the Spring of 2001, counsel for the property owners in that lawsuit sent copies of these documents to the EPA. Unfortunately, given the extent to which the EPA has "worked cooperatively" with industries manufacturing and using PFOA, in the intervening more than 15 years EPA has still not issued a federal drinking water standard for PFOA or its related chemicals. Indeed, in May 2018, through information gleaned from FOIA requests, it was discovered that several federal agencies had been working in concert to suppress the release of a draft report by the Agency for Toxic Substances and Disease Registry (ATSDR), documenting new studies regarding the toxicity of PFOA-related chemicals.

Therefore, in 2016, when VANR discovered widespread PFOA contamination in the Bennington area, it had no federal safety standards to rely on, and instead had to work quickly with the VDOH to review extensive toxicity studies and issue its own state safe drinking water standards. Vermont issued its Drinking Water Health Advisory for PFOA in June 2016, of 20 parts per trillion (ppt); this was recently updated in July 2018 to include the 20 ppt advisory for the sum of PFOA, PFOS (perfluoro-octane sulfonic acid), PFHxS (perfluorohexane sulfonic acid), PFHpA (perfluoroheptanoic acid) and PFNA (perfluorononanoic acid).

While the extent of EPA's regulatory oversight is impacted by the sorts of political and bureaucratic limitations outlined above, Vermont's regulatory responses, too, are limited by such practical issues as adequate funding and sufficient personnel, which affect their ability to effectively regulate the industries over which they have jurisdiction. These limitations were recognized by the bi-partisan and multi-disciplinary committee formed as a result of Act 154, which convened multiple stakeholders to review existing environmental laws & regulations, and to make recommendations to the Vermont Legislature regarding the use of toxic chemicals in Vermont.

The Importance of S.37

The first important point to make is that S. 37 will not be retroactive, and therefore will not impact the pending class action suit regarding PFOA contamination in Bennington.

The second important point to make is that S. 37 grows out of the recommendations of the bi-partisan, multi-disciplinary Act 154 committee. Part of their consensus report was the recommendation to establish strict liability for harms resulting from the manufacture or use of toxic chemicals in Vermont. Another recommendation was to establish the legal framework to enable Vermonters exposed to such toxic chemicals, as a result of tortious conduct by companies manufacturing or using them, to seek a program of medical monitoring, to detect at the earliest possible time any signs and symptoms of diseases known to be associated with exposure to such toxins.

Why did the committee make such recommendations? In recognition that Vermont companies which either manufacture, or purchase and use, toxic chemicals, are in the best position to learn and understand the likely risks of such chemicals. Companies that manufacture them should reasonably be required to ensure they have explored the toxicity of these chemicals before using them in Vermont. Companies that purchase such chemicals for use in Vermont should reasonably be required to demand from their manufacturers sufficient information to ensure their safe use and disposal in Vermont. And in the unlikely event the manufacturers fail properly to disclose such information, S. 37 provides a right of contribution against such manufacturers when a Vermont company is held liable. In this way, responsibility for harms resulting from these chemicals will be borne by the companies that profited from their use, rather than placing such responsibility on their innocent neighbors or the public in general.

Refuting Industry Arguments Against S.37

Industry is well represented in the Vermont legislature, and in the Vermont regulatory and rule-making process. Ordinary Vermonters' voices, however, are rarely heard, and not so well represented. The responses, below, seek to provide a voice for ordinary Vermonters in this important process.

As in the industry lobbying efforts put forth last year against S. 197, this year these same lobbyists make the following arguments against passage of S. 37:

1. Imposing strict liability will drive companies out of Vermont.
 - a. Response: Not true. Responsible companies will continue to operate here. If companies refuse to take responsibility for ensuring that the chemicals they manufacture, or purchase and use, are safe, then we probably do not want them operating here anyway.
2. Strict liability is an extreme and unusual expansion of legal liability.
 - a. Response: Not true. There already exist several very common legal claims that impose strict liability. These include the ancient claim of trespass. Those liable for trespass, including the invasion of microscopic chemicals onto another's property, are strictly liable, regardless of the care they took to avoid that invasion. They also include those engaging in so-called ultra-hazardous activities, like blasting; those liable for harms from such activities are strictly liable, regardless of the care they took to avoid causing harm. Similarly, those responsible under CERCLA are strictly liable. Similarly, those responsible for harms caused by unsafe products are strictly liable under existing products liability laws.
3. Strict liability will cause the cost of insurance coverage to skyrocket, or to simply be unavailable.
 - a. Response: Not true. Concerns about skyrocketing insurance rates is always a defense lobbying point against expanding liability, but rarely comes to fruition. Companies are already able to achieve insurance coverage for many strict

liability claims, including trespass, blasting, CERCLA, products liability, and others. But in the unlikely event that such concerns bear fruit, that information will be captured by the provisions in S. 37 requiring reporting on changes in insurance rates. And even were such concerns to prove correct, all the policy considerations cited herein still overwhelmingly support requiring the companies, and not their innocent neighbors or the public, to bear the true costs of their for-profit operations.

4. Strict liability renders permits meaningless.

- a. Response: Not true. Permits have always been the “floor” of liability, not the “ceiling.” That is, like a driver’s license, a permit to emit chemicals into the air, ground or water only allows the operator to engage in the activity at what is calculated to be a safe level. But a permit is not a shield: any harms resulting from the operation of a car, or the operation of a permitted business enterprise, remain the responsibility of the driver, or the permitted business.

This argument also ignores two very important factors: first, that the regulatory bodies are frequently underfunded and understaffed, and cannot always adequately police the entities under their jurisdictions; and second, that regulated entities are actively involved in lobbying the regulators, not only about so-called safe limits set forth in regulations, and any exemptions from such regulatory limits, but also regarding the terms and parameters of their own permits.

5. Strict liability means a company is stripped of all legal defenses in a suit brought against it.

- a. Response: Not true. A company will still have an arsenal of legal and factual defenses, enabling defendants with financial resources to drag out legal proceedings over years, to employ highly paid experts to dispute any scientific findings of the plaintiffs’ experts, and to erect legal hurdles which may make it impossible for such lawsuits to proceed.

For instance, companies facing strict liability claims will be still able to argue that: the plaintiffs’ properties are not, in fact, contaminated; if they are contaminated, they are not contaminated with any chemicals originating from the defendant’s facility; if they are contaminated with chemicals originating from the defendant’s facility, the contamination is not harmful, either to the plaintiffs’ property or their persons; if the chemical is harmful, the plaintiffs cannot prove they have lost any property value, use or enjoyment, or that any surveillance program of medical monitoring proposed by plaintiffs will help, or that any such medical monitoring program is improper and legally insupportable for any number of reasons; or that the plaintiffs waited too long to sue, and so are prohibited by the relevant statute of limitations.

This is not to mention the likely years of litigation over what, exactly, the terms of S. 37 mean, and whether they are legal, appropriate, or constitutional.

6. Strict liability means “responsible” companies will be treated the same as flagrant polluters.
 - a. Response: Not true. Responsible companies are far less likely to cause harm, by doing their due diligence at the outset, and making sure their use and disposal of all chemicals is done as safely as possible. If they do cause harm, they likely were not behaving as responsibly as they could have been. And if they did take all reasonable precautions, and chemicals they used or disposed of do cause harm to innocent victims, who should be responsible for those harms? The innocent victim, who neither used/disposed of the chemicals, nor shared in any of the profits? The general public? No, the entity that used and disposed of such chemicals, and reaped the profits from doing so. Placing these “external costs” squarely on the responsible company reinforces the public policy concerns the Act. 154 committee was seeking to address.

7. Strict liability will make it so easy to bring these claims that there will be an avalanche of litigation.
 - a. Response: Not true. Very few Vermont attorneys, and even fewer outside law firms, bring these claims currently, and few will do so in the future. Why? These cases take years to litigate. The defendant companies either have insurance coverage, or internal financial resources, sufficient to hire the most expensive and best equipped defense law firms available. These firms dispute every stage of the litigation, including filing motions to dismiss before even answering the complaint. These cases are vigorously defended, as much because the defendants seek to prevail, as to exhaust the plaintiffs’ legal resources and to deter future litigation by making these cases as difficult and expensive and time-consuming as possible. The companies fight hard *not* to produce information in discovery (for instance, SGPP has still not produced in our lawsuit definitive information regarding the number of pounds per year of PFOA they used, or disposed of). The companies frequently appeal any adverse judgment against them.

Moreover, very few ordinary citizens can afford to pay attorneys by the hour for taking on these cases, or to pay for the expert witnesses necessary to prove the claims. Those firms that do take these cases, like ours, do so on a contingency fee basis. That means we do not get paid for the many, many, *many* hours we work on the case, unless and until we recover for our clients. Thus, not only do the plaintiffs’ attorneys have no guarantee of ever getting paid, but we also must front the significant expert fees, and other litigation expenses, throughout the course of the litigation.

This should make it clear that these are not cases to be taken on lightly. We do so only after careful investigation convinces us that: (1) we can prevail factually and legally in our claims against the company; (2) the plaintiffs have suffered significant harms and losses, in an amount that will permit us to achieve a reasonable judgment or settlement, in an amount which will enable us to recover

our contingency fees and litigation expenses; (3) and that the company either has the financial resources to pay the judgment or settlement, or has insurance coverage sufficient to do so.

8. Medical monitoring allows people without an injury to seek relief through the courts, which would be a radical departure from tort law.
 - a. Response: Not true. Tort law has long recognized that liability for future medical care arising from a present injury is compensable; for instance, the party who caused a car collision, resulting in the plaintiff's broken knee, may also be held responsible for the costs of a future knee replacement which is not yet necessary, but which medical experts testify will likely be necessary due to arthritis which will likely develop in the knee in the future.

This bill, consistent with statutory and common law remedies of medical monitoring in other states, recognizes that impacts of certain types of chemical exposure can be proven – and represent a present injury -- *before* full-blown diseases have manifested. That is the case with PFOA in Bennington: the Vermont Department of Health has taken blood samples from residents exposed to contaminated drinking water, and those with levels of PFOA in their blood serum above national background levels are at greater risk of developing certain diseases which, if diagnosed early, can result in earlier treatment and better medical outcomes. The increased level of PFOA in blood *is* a present injury which can be proven. But not all chemical exposure can be proven by a blood test reflecting above-background levels of a substance, and national background levels have not been established for most chemicals. Other ways of measuring exposure may include risk analysis, where experts calculate how much exposure has occurred (how long someone has been consuming/breathing/absorbing a substance at what levels), and what is the likely increased risk of developing diseases in the future.

The point is that if experts can provide sufficient admissible evidence in court that someone has been exposed to a chemical as the result of another's tortious conduct, at a level which increases the risk of future disease, that *is* a present injury; and if there is also sufficient evidence that medical monitoring is available to address those risks, then and only then will the elements of a claim of medical monitoring be established.

9. The test of medical monitoring in S. 37 is the most lenient in the country and will lead to a flood of litigation.
 - a. Response: Not true. First, the test in this bill is consistent with that of other states. It requires admissible, expert evidence on each and every one of the following requirements: (1) that the defendant acted tortiously – that is, that it violated appropriate legal standards recognized by tort law; (2) that as a result of the defendant's tortious conduct, the plaintiff was exposed to a toxic substance released by the defendant; (3) that there is a probable link between exposure to the

toxic substance and the a latent disease; (4) that the person's exposure increases the risk of developing the latent disease; (5) that diagnostic testing for the latent disease is reasonably necessary; and (6) that medical tests or procedures exist to detect the latent disease.

Second, the standard for medical monitoring articulated by Vermont Federal Court Judge Crawford, in the Bennington PFOA case, is more lenient than that articulated in S. 37. The plaintiffs must show:

1. Exposure to a potentially harmful substance;
2. For which the defendant is liable under an accepted legal theory such as negligence, nuisance, or strict liability;
3. An increase in the risk of injury or disease caused by exposure;
4. The availability of a monitoring program which is
 - (a) different from the care provided to anyone who sees a doctor regularly; and
 - (b) useful for early identification of injury associated with exposure to the harmful substance.

9/13/17 Order [Doc. 105], *Sullivan v. Saint-Gobain performance Plastics Corp.*, Case No. 5:16-cv-125, at page 6.

This body should rest assured that no law firm will be willing or able take on a medical monitoring claim – and pay the tens (or more likely hundreds) of thousands of dollars in expert fees necessary to establish each and every one of the S. 37 elements -- unless they've investigated the case thoroughly and believe the case can be proven. That is because these cases are taken on a contingency-fee basis. That means the plaintiff's attorney will not get paid, either for her many hours of legal work, or the expert fees her firm must advance in the litigation, unless and until she wins the case by verdict or settlement.

And the courts have already established very high standards for the admissibility of expert testimony – the so-called *Daubert* or *Frye* standards. Each expert is subjected to rigorous examination, and only if their testimony is based on clearly defined methods, reflecting standards set forth in peer-reviewed journals, will that testimony be admissible. Even if the testimony is deemed admissible, it must make sense and be compelling to a jury (and Vermont juries are very skeptical).

So it is absolutely not the case that there will be a flood of litigation. In fact, Vermonters will be lucky if there are lawyers willing to take on these claims, even with the passage of S. 37.

10. The flood of litigation will leave little money to pay the claims of those who have developed a disease.
 - a. Response: Not true. As hard as it is to prove all the elements of medical monitoring, even under S. 37 – it is that much harder to prove that someone has

actually developed a disease as the result of specific chemical exposure. Why? The plaintiff in such a case has a two part burden under the law – first, to prove by expert evidence that the chemical is *capable* of causing the disease; and second, and again with expert evidence, that the nature and extent of the plaintiff’s exposure to the chemical is *the cause* of her disease (as opposed to all the other possible causes).

Epidemiological studies on the impacts of chemical exposure on humans is much less common than we think; of course there can be no experimentation on humans, as on laboratory animals. So there is often insufficient evidence to prove the first prong of the two part test. The second prong is even harder to prove by expert evidence, as we are unfortunately exposed to many chemicals every day – think pumping our own gas; absorbing secondhand smoke; drinking milk in plastic containers; inhaling chemicals from carpets, new sofas, etc. Therefore, cases alleging specific injuries from chemical exposure are relatively rare, and occur in specific instances where epidemiological evidence exists (such as asbestos, lead poisoning, etc.). For many people, their best hope for recovering for the harms caused by tortious chemical exposure will be the medical monitoring, which hopefully will increase their chances for earliest detection and treatment.

11. The medical monitoring test is too lenient, and should instead require exposure above background conditions, and proof that there is a significant risk that exposure will cause a serious disease.

- a. Response: Not true. As the discussion in # 9 reflects, there will not always be good statistics or peer-reviewed science on what a “background level” is for a specific chemical. Although there are studies reflecting so called background levels for PFOA, there are not for the vast majority of chemicals. Moreover, much of the litigation in Bennington is over *which* studies, and *which* background levels, are the right ones. So restricting medical monitoring to those for which national background levels exist would be to deprive many exposed Vermonters of the medical monitoring remedy, and further bog down litigation in disputes about which background levels are the proper ones on which to rely.

Similarly, and for all the reasons explained above, lawyers will not take on a contingent fee case, for which they must front not only their many hours of legal work, but also the often staggering expert fees, unless they are confident they can prove the six very demanding elements required by S. 37 for establishing medical monitoring. If an exposure is not significant, or the risks are not of incurring a serious disease, the case is unlikely to be brought.

However, erecting the additional legal hurdles of proving that a risk is *significant*, or that a disease is *serious*, will only increase the legal battles to be fought, and decrease the likelihood that lawyers will take on these cases. Why? Because these terms are not self-evident or self-defining, and experts will now not only have to prove the already challenging six elements of the medical monitoring claim, but also what it means for a risk to be significant, or a disease to be serious.

Remember, the threshold for allowing in expert opinions in court, under the *Daubert/Frye* legal standards, is already very high. The challenge of establishing the six medical monitoring elements is properly significant. It is wholly unnecessary, and will undermine the policy goals of the legislation, to erect further barriers to establishing the claim, and will only result in fewer claims, and more expensive legal battles – which is precisely why the industry lobbyists wish for their inclusion.

12. Medical monitoring should be limited to exposure to chemicals on a list of toxics.

- a. Response: Not true. As should be clear by now, federal law is already heavily weighted in favor of industry, such that under TSCA, it is up to the chemical manufacturer to report to EPA that a chemical may be of concern and warrant inclusion on a list for regulation. Most emergent chemicals are on no lists, and industry lobbyists work hard to keep them from appearing on lists. PFOA was brought to the attention of the EPA in 2001 as the result of private litigation, and almost two decades later is still not regulated federally. As such, in other states recognizing medical monitoring, the remedy is not limited to any particular list of chemicals.

Remember, the burden of proof the plaintiff must establish for a nonlisted chemical -- by admissible expert evidence which meets the steep *Daubert/Frye* legal standard – is that exposure to the chemical can be shown by expert testimony to increase the risk of developing a latent disease. This, in itself, is a steep burden, and a daunting one. If it can be proven, it is enough evidence that a chemical poses a threat to human health to warrant legal protection for those harmed by tortious exposure.

Remember, too, that companies either manufacturing, or purchasing and processing, unlisted chemicals are in the best position – better than regulators – to know if a chemical poses threats to human health. They are required to receive and review Material Safety Data Sheets (MSDSs), which list the harms potentially arising from exposure to the chemical. They are in the best position to inquire into these risks, before deciding to use them in their profit-making enterprise, and to do so in a way that risks exposure to others. Every incentive should be made to make sure these companies do their due diligence to ensure their workers' and neighbors' safety; they should not get a “pass” if their chemicals are not yet on a list.

In each instance in which industry-lobbyist attempt to modify the language of S. 37, their efforts are to insulate their clients from liability, or erect steeper barriers for those harmed to recover against them. Rather than chipping away at a bill whose language has been carefully drafted to effect a fair balance of concerns, I urge you to pass the bill as drafted, and let the courts sort out legal challenges. If, after some time has passed, there are legitimate concerns raised in court cases about the statutory language, this body can further modify the legislation.

The truth is, with or without passage of S. 37, lawsuits brought against well-heeled companies whose industrial processes cause harm to their industrial neighbors will continue to be “David versus Goliath” battles. This bill will only slightly shift the balance a little more favorably to their innocent victims.

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