Testimony of Emily Joselson, Esq. in Support of S.37 (2/12/19)

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 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.

<u>Practical Limitations on Regulatory Oversight</u>

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.

<u>The Importance of S.37</u>

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 if 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.

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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