Statement of
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on H 5424, The Rhode Island Climate Superfund Act of 2025
Submitted for the Record
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Introduction

My name is Thomas Gibson. I live in Newport, Rhode Island, where I serve on the boards of several nonprofits and other civic groups that share a common challenge: dealing with the impacts of climate change. I am pleased to submit this testimony in strong support of **House Bill 5424, The Rhode Island Climate Superfund Act of 2025**. This testimony reflects my experience from four decades of involvement in environmental policy issues at the federal, state, and local levels, including service as Chief of Staff of the US Environmental Protection Agency and as Counsel and Deputy Chief of Staff on the US Senate Environment and Public Works Committee for the Chairman, the late Senator John H. Chafee. The views expressed are my own and do not represent the views of any organization or group where I volunteer my time.

The Problem Facing State and Local Governments

The impacts and costs of climate change in Rhode Island are already considerable and accelerating. The climate-induced phenomena of sea level rise and extreme weather events are readily apparent in coastal communities like Newport, where neighborhoods like The Point and the Fifth Ward along Wellington Avenue now regularly suffer from clear-day flooding events. Storm events that were once anomalies have become the new normal. And while climate-related impacts are not just felt on the coast, coastal cities like Newport are on the front lines where fixed, often aging, infrastructure is directly exposed to the double threat of sea level rise and extreme weather events.

The City of Newport, to its great credit, is attempting to deal with the threat posed by climate change. Last November, Newporters approved a $98.5 million bond issue, more than half of which will be devoted to projects to make Newport more resilient to the impacts of climate change and sea level rise. Planned projects include repairing the seawall at Perotti Park, relocating critical public safety infrastructure out of a zone that floods regularly, and protecting a drinking water reservoir behind Easton's Beach, among other projects. The heavily-used Elm Street Pier required emergency replacement after the severe Nor'easters experienced in the Winter of 2023/24. At King Park, a $2.4 million grant from the Rhode Island Infrastructure Bank will replace a failing seawall with a more resilient structure, including an expanded beach to absorb storm surges better. Elsewhere, repeated failures along Newport's most visited tourist attraction, the Cliff Walk, have been attributed to severe weather, with repair costs estimated at $16 million to be paid from various city and federal funding sources.

Sadly, all of this is just a downpayment. The backlog for basic infrastructure needs in Newport alone is estimated at over $500 million, much of which is damaged or at risk from sea level rise

and storm events. Newport is also the home of several flagship state-owned assets, such as Fort Adams State Park, Brenton Point State Park, and State Pier 9. These state-owned assets already have large maintenance backlogs from damage due to climate change impacts.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980

The local costs of climate change are staggering, and it is fair to ask who should pay these costs. In the 1970s, after a series of environmental disasters from the improper disposal of hazardous waste, society faced a similar question: who should pay for the cost of cleanup? The answer then was that "the polluter should pay," and Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, known as either "CERCLA" or, more popularly, "Superfund." Polluters paid in two ways: through a tax on certain chemical and petroleum products to be used for cleanups generally, and through a powerful liability system to raise funds among responsible parties at specific sites where they had disposed of, or arranged for, disposal of hazardous substances. Liability was strict (without fault), retroactive, and joint and several. This liability scheme, including its retroactive reach, was often challenged in federal courts, including the US Supreme Court, and has been repeatedly recognized as lawful.

CERCLA's Flaws, Reform Efforts & Fair Share Allocation

Superfund spawned decades of litigation at every site. EPA would sue the biggest responsible parties—the "deep pockets;" they would, in turn, sue smaller parties. At some contaminated sites, CERCLA could, and did, reach the point of large companies suing individuals who might have sold a few car batteries to a metals recycler. Throughout the 1990s, I was involved in efforts to reform CERCLA, principally when I served as Counsel on the US Senate Environment and Public Works Committee. As the lead Senate staffer on those efforts, I negotiated with other Senate offices, federal agencies, and countless stakeholders. While we could never agree on related issues like cleanup standards, there was a broadly supported consensus, including large corporate responsible parties, to replace Superfund's litigation machine with a system of fair share allocation. Each responsible party would have its proportional liability share determined by an arbitrator in an allocation, not through litigation. It would have been a significant improvement to CERCLA, but it was a casualty of other issues that halted those reform attempts.

H 5424 Requires Polluter To Pays While Avoiding CERCLA's Flaws

Now, 45 years after CERCLA, we come to a similar public policy question, but instead of hazardous substance cleanup, the question is who should pay for the public costs attributable to the emissions that cause climate change. In the era when the now-familiar landmark federal environmental bills became law decades ago, we could have expected the US Congress to speak to such an important policy issue. Unfortunately, those days are long past. With a few minor exceptions, major environmental statutes---the Clean Air Act, the Clean Water Act, and CERCLA---have not seen meaningful change since the 1990s. These laws are frozen in time and do not reflect the enormous changes in our understanding of the environment since the laws were enacted. Climate change was barely on the radar of policymakers in Washington in that era. In the last three decades, Congress has been unable to move forward with any significant legislation on climate change. Quite the contrary, efforts on comprehensive climate bills failed

spectacularly during both the Clinton and Obama Administrations. This has left it to the states to fill the void on climate change. This federal void is why the "Climate Superfund" concept is gaining traction in many states; Vermont and New York have passed legislation similar to H 5424 in the past year, and more states, including California, are considering such legislation.

The term "Superfund" can be scary, given its origins and legacy as a reaction to catastrophes like Love Canal. And while H 5424 shares its "polluter pays" principle with the original CERCLA, H 5424 is not at all the same as the reviled 1980s-era CERCLA litigation machine. In fact, the bill adopts the allocation-based approach that gained broad support during the CERCLA reform efforts. The bill establishes several one-time processes: a tabulation of costs incurred by the states and municipalities, identification of the finite set of responsible parties, and a fair share allocation of costs among those parties. This simplicity is attained because H 5424 avoids several CERCLA features that spawned endless litigation. First, the universe of responsible parties is finite, unlike CERCLA's open-ended definition that encouraged responsible parties to drag anyone remotely connected to a site for contribution. Second, the only recoverable costs are those borne by the state or municipalities in a defined period, from the start of 2009 through the end of 2025, and as determined in a process led by RIDEM. The size of the "pie" will be established, which is very unlike open-ended CERCLA cost recovery. There is no private right of action created for individuals to recover costs. Finally, while the basis of liability is the same as CERCLA, a responsible party's proportionate fair share of liability is determined in a one-time allocation, not interminable multi-party complex litigation.

That is not to say H 5424 will not be challenged should it become law. Opponents will make any number of claims that it is inconsistent with law. Many of these same claims were made against the original CERCLA, whose retroactive liability scheme was repeatedly upheld. Opponents will invoke Constitutional claims such as federal supremacy, claiming the Clean Air Act already "occupies the field" and leaves no room for state legislation. There are answers to all of these objections, and Rhode Island will have other states as allies in those fights should H 5424 become law. Fear that the law will be challenged should not dissuade you from acting.

Suggested Improvement to H 5425

In reviewing H 5424, I have one suggestion to prevent delays in implementation. Section 42-6.3-5(d) states that "[t]o pay for initial analyses of climate change response work, the department shall require responsible parties to pay a proportional share of that amount no later than September 1, 2025." This could be read to imply that the funds for RIDEM to perform the allocation will be charged proportionately based on the allocation. If that is a correct interpretation, it could delay implementation as responsible parties can be expected to litigate any such preliminary billings. A better approach would be for the Legislature to make an appropriation to cover the initial allocation costs and to make those costs a qualifying recoverable expenditure under section 42-6.3-1(13).

Conclusion

The State of Rhode Island and its communities face unaffordable costs for the accumulated damages from climate change to public property. The public policy question before you is who should pay—Rhode Island taxpayers alone, or should the government seek contribution from a limited set of the largest entities that have benefited for decades from the extraction and refining of fossil fuels? Clearly, the correct answer is that those responsible parties who profited should help pay for the damage to public property caused by climate change. Based on my decades of experience in policy debates in Washington, no federal legislation to address climate change liability for past costs or to put a price on carbon prospectively is forthcoming. In the modern era of environmental law, the initiative and leadership will have to come from state governments. I urge this committee to report H 5424 favorably and for the General Assembly to make it law in 2025.

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