



LAW OFFICE OF SUSAN J. CRANE

June 5, 2023

Sen. Paul R. Feeney, Senate Chair
Rep. James M. Murphy, House Chair
Joint Committee on Financial Services
State House
Boston, MA 02133

Re: Please support S. 648 and H. 1129: *An Act relative to the remediation of home heating oil releases.*

Dear Chairman Feeney, Chairman Murphy, and Committee Members:

For nearly 30 years, I have represented numerous homeowners in the pursuit of insurance coverage for the cleanup of home heating oil releases on their properties. Most homeowner's policies today, however, specifically exclude coverage for any type of "pollution" claim. After an oil release, this almost universally comes as a nasty surprise to insureds, leaving homeowners to foot the bill for costly residential fuel oil cleanups, averaging over \$100,000. Over the years, I have had four clients whose home heating oil cleanups have cost over \$1 million each.

Background

Approximately 100 oil releases from residential properties in Massachusetts are reported to the Massachusetts Department of Environmental Protection ("MassDEP") each year,¹ but it is believed that the actual number is considerably higher, as many go unreported. Under Massachusetts General Laws chapter 21E, owners of property from which there has been a fuel oil release are generally strictly liable (*i.e.*, without regard to fault) to pay for and undertake a cleanup of the oil on their own property and on any other impacted properties to which the oil has migrated.

Residential fuel oil releases take their toll on homeowners and the environment in myriad ways. Harmful vapors from oil released into the subsurface can readily impact indoor air. If oil migrates to the groundwater, it can make drinking water supply wells unusable unless costly filtration systems are installed. Sometimes homes must be moved off their foundations to accommodate the excavation of contaminated soil, requiring residents to relocate for extended periods of time. The financial impact on homeowners can be devastating. Public funding is rarely available to pay for the cleanups for this

¹ In 2021, the most recent calendar year for which MassDEP has released data, 93 heating oil releases at residential properties were reported to MassDEP. *MassDEP Report to the Joint Committee on Environment, Natural Resources and Agriculture, dated August 16, 2022.*

vulnerable segment of our population. Sometimes there is simply no funding available for cleanups, rendering residential properties significantly devalued and unsafe, and the environment impaired. The emotional toll on homeowners cannot be overstated, and many have required the assistance of professional mental health counselors.

2009 Legislation – An Attempted Fix

I have been working on a solution to home heating oil release funding for what has now become a two-decades plus *pro bono* effort. From 2000 - 2008, I was a member of a 21E Homeowner Funding Work Group comprised of environmental lawyers and consultants, insurance and oil company representatives, MassDEP representatives and others concerned about funding mechanisms for residential fuel oil cleanups in Massachusetts. That effort led to the enactment of M.G.L. c. 175, § 4D, which went into effect in 2010. It required homeowner's insurers to "make available" so-called "liquid fuel" riders to homeowners seeking environmental cleanup coverage, as long as certain preventative upgrades to their heating systems were made and certified, and subject to a relatively small additional premium.

In insurance parlance, making this coverage "available" is not the same as "offering" it to all homeowners; rather, it only requires insurers to offer a fuel oil rider to those insureds who *affirmatively* request it. The legislation was a compromise with the insurance industry, after it had effectively lobbied against a bill for legislation in three consecutive legislative sessions that would have mandated home heating oil release cleanup coverage.

Although some homeowners have benefitted from the law, and it appears that its preventative heating system upgrade requirements may have resulted in a reduced number of home heating oil releases, the law does not go far enough for a variety of reasons:

- It does not require insurers actively to "offer" the coverage for an additional premium or to "provide" the rider. Consequently, most homeowners are unaware of its availability and do not request it from their insurance carriers.
- Many homeowners who are offered the rider by those insurers actively marketing it opt not to invest in it, even though it would typically increase their annual premium by something less than \$100, presumably either because they do not appreciate the risk or do not want to pay for system upgrades and/or additional premiums. As of the end of 2021, MassDEP reported that 64,591 Massachusetts homeowners have purchased riders out of approximately 650,000 Massachusetts homes heated by oil, or less than 10%.²

² See MassDEP 2022 report, cited in Fn. 1.

- The legislation’s minimum coverage is \$50,000 first party (*i.e.*, property damage) and \$200,000 third party (*i.e.*, groundwater or off-site cleanups/liability defense and indemnity),³ which can be insufficient. Meanwhile, we are observing that the trend continues for homeowner’s insurers to add pollution exclusions to standard policies.
- Since this insurance coverage is not widespread, some insurers do not understand their legal obligations under the rider and make coverage extremely difficult for homeowners who have procured this specialized coverage and then have fuel oil releases on their properties.

S. 648 and H. 1129 – The Proposed Solution

Senate Bill 648, sponsored by Sen. Anne Gobi, and the identical House Bill 1129, sponsored by Rep. Jeffrey N. Roy and Rep. Lindsay N. Sabadosa (collectively, the “Bills”), would address the loopholes in Section 4D of Chapter 175 that keep the availability of liquid fuel oil policies a well-kept secret, resulting in specialized liquid fuel oil riders for only a small percentage of Massachusetts’s oil-heated homes. This bill would mandate coverage for fuel oil releases from residential above-ground storage tanks systems, with increased minimum coverages of \$75,000 (first party) and \$250,000 (third party) to keep pace with escalating cleanup costs. The Bills make sense:

- They are simple, easy to implement, and cost-effective.
- The risks of home heating oil should be covered under every policy, just as they are for other types of heating systems. Explosions caused by natural gas heating systems and fires caused by electrical heating systems are generally covered, even in policies for homeowners who do not use those forms of energy. Fuel oil should be treated no differently.
- By spreading out the risk among approximately 2 million Massachusetts homeowner’s policies, the incremental cost per policy for cleanup costs based on risks to the insurance industry has been estimated as *de minimus*.

³ Most homeowner’s policies are comprised of two parts: Section I/first party property coverages; and Section II/third party liability coverages. Section I property coverages extend to damage to a homeowner’s own property, such as any structures and personal property of the insured. Under a liquid fuel rider, on-site soil remediation falls under first party, since it is owed by the insured. Coverage under Section I includes restoration to landscaping and hardscaping, and building repairs after an intrusive cleanup. Section II provides liability coverage to the property owner. Under a liquid fuel rider, liability coverage extends to groundwater and off-site remediation. Legal costs associated with the fuel oil release to defend MassDEP’s Notice of Responsibility issued to the homeowner and to defend any other third party claims asserted against the homeowner for property damage or bodily injury are also covered, as well as indemnity for payments made to claimants.

- All Massachusetts residents and our environment would benefit, not just homeowners using fuel oil. With insurance funding, groundwater contamination, which can readily spread across property lines if not abated quickly, would be promptly cleaned up, preventing contamination of water supplies and vapor intrusion into downgradient properties. Surface water bodies would be protected from the deleterious effects of oil on fish and other aquatic animals. Any natural ecosystem impacted by oil will suffer in the absence of a prompt and comprehensive cleanup of an oil release.

Homeowner testimonials

In conjunction with the pending bill, you will hear from homeowners about the financially and emotionally devastating effects of uninsured oil releases on their residential properties. Some have temporarily had to relocate their families during a cleanup because of safety factors arising from structural issues during the remediation or potential exposure to dangerous levels of petroleum constituents. Some have had their and perhaps also their neighbors' private water supplies impacted, forcing them to find alternative drinking water sources or to install costly filtration systems. Others have drained their life savings, children's college funds, or retirement funds to pay for a cleanup. Still others have no means whatsoever to fund a cleanup; they have lost all of the equity in their homes, their primary or sole asset, and they must continue to live in houses on contaminated land.

One of my clients was an octogenarian widow who passed away a few years ago and whose oil release occurred in the late 1990s. Due to funding issues for a cleanup costing well over \$1 million, her property took two decades to clean up and close. As a result of her property's significantly diminished value prior to site closure, she could not sell her house and use its equity to move into suitable elderly housing. This dramatically impacted her options late in life and the lives of her adult children, who assisted her through the arduous cleanup process. Sadly, she passed away before ever seeing the site closed. Similarly, in the last legislative session, another client in his late 80s, Nicholas Stephens of Hopkinton, testified before this Committee on an identical bill to the Bills. After spending over \$500,000 on the cleanup, he passed away a few months ago, and now I am working with his daughters on final site closure with MassDEP.

The Bills offer a fair and well-crafted solution to resolve a significant financial, environmental, and public health and safety issue at residential fuel oil sites. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Susan J. Crane