ENVIRONMENTALLY-DRIVEN ZONING LAW

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I. Performance Standards

A. Water Quality Certifications

Activities such as dredging and filling require a § 401 water quality certification under the federal Clean Water Act from the DEP if the activity will result in a discharge to the navigable waters of the United States. 33 U.S.C. § 1341. The certification is required to ensure that the proposed activity will not violate the state's Water Quality Standards. The DEP typically issues the 401 certification concurrently with any wetlands construction permit that is issued. It is permitted by statute to charge a fee for such certifications.

B. Coastal Management Act

For any activity located within the coastal zone, consistency with the policies and procedures of the Coastal Management Act must be met pursuant to Conn. Gen. Stat. § 22a-90 et seq. This statute must be evaluated when proposing any type of development or regulated activity within the coastal zone. There are three elements of the Act in particular that can restrict development: (1) the proposed activity must be consistent with all resource and use policies of the Act; (2) all adverse impacts on "coastal resources" must be minimized; and (3) adverse impacts on future water-dependent development opportunities and activities must be minimized. But see Connecticut Conservation Association, Inc. v. Bridgeport Zoning Commission, 6 Conn. L. Rptr. 866 (May 28, 1992) (holding that a local zoning commission is only obligated to consider DEP recommendations, not implement them).

II. **Best Management Practices**

A. Aquifer Protection Areas

1. Statutory Structure

Over 1 million residents, or 32% of the population in Connecticut, are supplied their drinking water by groundwater from aquifers. In 1988, the legislature required the DEP Commissioner to establish standards for mapping and modeling the location of all areas of contribution and recharge areas for existing wells located in stratified drift aquifers that are within water company water supply areas. Conn. Gen. Stat. § 22a-354b. Two standards of mapping, Level A and Level B, were established, with Level A being the more detailed mapping. Level B mapping was required to be accomplished by each public or private water company serving 1,000 or more persons by July 1, 1990. Within one year of DEP approval of Level B mapping, each municipality must inventory land uses overlying the mapped zones of contribution and recharge areas of such aquifers. Level A mapping must be completed by each public and private water company serving 10,000 or more persons not later than three years after DEP adopts a model municipal aquifer protection ordinance. Conn. Gen. Stat. § 22a-354c(a).

After it received the report of its Aquifer Protection Task Force dated February 15, 1989, the legislature passed Public Act 89-305, now codified at Conn. Gen. Stat. §§ 22a-354a to 354bb. The principal objective of this legislation, similar to the Inland Wetlands and Watercourses Act, is to require municipalities to regulate land use in aquifer protection areas consistent with model regulations provided by the DEP.

The triggering event for municipal regulation in aquifer protection areas is the DEP's adoption of regulations for land use controls in these areas. The Commissioner was required to adopt the regulations by July 1, 1991. Conn. Gen. Stat. § 22a-354i.[1] These regulations must establish best management practice ("BMP") standards for existing uses, and create a schedule for compliance of nonconforming "regulated activities." The Commissioner also must establish BMPs for, and prohibitions of, certain regulated activities in aquifer protection areas. "Regulated activity" is defined in the statute as any action, process or condition which the Commissioner determines, by regulation, "to involve the production, handling, use, storage or disposal of material that may pose a threat to groundwater," including structures and appurtenances related to the activity. § 22a-354h(1).

Following adoption of the DEP's regulations, the planning and zoning commission in each town containing an aquifer protection area is required to delineate on the zoning map the boundaries of those areas. § 22a-354n. Each such municipality also must designate an existing board to act as its "aquifer protection agency" within three months after the DEP adopts its regulations. Within six months after the Commissioner approves Level A mapping, the aquifer protection agency must adopt regulations for aquifer protection. Once the municipal regulations are adopted, no regulated activity shall be conducted within any aquifer protection area without a permit from the town's aquifer protection agency. § 22a-354p.

The statutes provide for an appeal by a person aggrieved by any regulation or decision of the DEP or aquifer protection agency in a manner very similar to the statutory appeal from

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[1] As discussed below, the regulations have not yet been adopted. The Commissioner also was required to prepare by October 1, 1995 a model ordinance, consistent with the regulations, for use by municipalities in adopting their regulations. Conn. Gen. Stat. § 22a-354l. DEP has provided a non-binding guidance document for municipalities in the interim.

wetlands decisions. § 22a-354q. They also contain familiar enforcement provisions including the issuance of an order to stop or correct the activity, assessment of a fine of up to $1,000 per day, criminal penalties, and recovery of all costs, fees and expenses, including reasonable attorney's fees. § 22a-354s.

2. Proposed DEP Regulations

DEP issued a proposed regulation dated March 2000 and entitled "Aquifer Protection Areas - Land Use Controls," which will be codified at Regs. Conn. State Agencies §§ 22a-354i-1 through 10. As of early May 2003, the regulation was still being reviewed within the DEP and Office of the Attorney General prior to a revised version being made public. A brief summary is provided below.

After tracking the requirements and deadline in the statutes, the proposed regulation provides a long list of activities that are prohibited in an aquifer protection area if it is a new activity, and subject to the aquifer protection regulation if it is an existing activity. A listed activity will not be prohibited if it is: (1) an "ancillary activity"; (2) exempted; (3) registered as an existing regulated activity; or (4) a modification of an existing regulated activity. An "ancillary activity" is a regulated activity that is "subordinate to, or supportive of" a non-regulated activity and which involves the use or storage at any one time of no more than 55 gallons of a hazardous substance. It must take place within an entirely enclosed building.

A new activity on the prohibited list may be permitted upon application for an exemption to the DEP if the Commissioner finds that the activity will not pose a threat to any existing or potential well field. The owner must demonstrate "clearly and convincingly" that a non-hazardous material has been permanently substituted for each hazardous material normally

used in the activity, or that any hazardous material discharged to the groundwater would not require treatment. Existing regulated activities must be registered within 90 days after the municipality adopts aquifer protection regulations, and will be permitted to continue provided that they continue to comply with "Best Management Practices" outlined in the proposed regulations, which mirror current regulatory requirements.

The fourth possible exemption is modification of an existing and registered regulated activity, which means "to expand an existing regulated activity by increasing the physical size of the facility at which such regulated activity is conducted, or by increasing the storage capacity for hazardous materials; or to alter a regulated activity in a manner which may increase the risk of pollution of the affected aquifer." The regulation specifies the criteria by which certain existing activities may be modified as-of-right; with written confirmation from the applicable agency that the new activity is in fact a non-regulated activity; with the written consent of the applicable agency and certification by a professional engineer or certified hazardous materials manager; or only by permit from the applicable agency.

The proposed regulation ends with a list of Best Management Practices for all regulated activities conducted in an aquifer protection area. The BMP's are broken down into mandatory requirements and "optional requirements," with the mandatory requirements pertaining mostly to the storage of hazardous materials.

B. Soil Erosion and Sediment Control

The DEP in 2002 published its new Connecticut Soil Erosion and Sediment Control Guidelines. The new version is a complete re-write of the 1988 version, but the model municipal regulations are the same. The Guidelines contain up-to-date BMP's for controlling

soil erosion and sedimentation during development. The 402-page three-ring binder is available for $90 from the DEP Bookstore in Hartford.

III. **Habitat Preservation and Bio-Regionalism**

The most important local development in the area of habitat preservation has been the increasing tendency of municipal wetlands commissions to regulate development activities in upland (i.e., non-wetland) areas that provide habitat for wetland-dependent species (such as certain frogs and salamanders, also known as "herptiles"). In AvalonBay Communities, Inc. v. Wilton Inland Wetlands, 2001 WL 1178565 (Sept. 6, 2001), the plaintiff proposed a 119-unit apartment development on 10.6 acres adjacent to Route 7 in Wilton. The site plan -- as revised after an initial denial -- proposed no activities within a wetland or watercourse or the designated upland review areas. The commission denied the application, finding that AvalonBay had failed to demonstrate that there was no feasible and prudent alternative which would have less impact on the salamanders found on the site. AvalonBay appealed, claiming that the commission improperly exercised jurisdiction over a site plan that did not propose any construction activities in a wetland, watercourse or regulated area, and did so based solely on its finding that the site plan would disrupt a non-wetland habitat of a common species of salamander. It also claimed that even if the commission had jurisdiction, there was no evidence in the record of any impact on a wetland or watercourse.

The commission argued that it had jurisdiction over the AvalonBay application because the proposed development would impact the wetlands by reducing their biodiversity, in that the development would adversely affect the population of spotted salamanders in the upland portion of the site, and spotted salamanders are an "obligate" wetlands species. The DEP

joined the appeal in support of the commission and argued that the salamanders are part of the wetlands resources. The Superior Court found that the commission lacked jurisdiction over AvalonBay's application. It held that the 1995 and 1996 amendments to the Inland Wetlands and Watercourses Act were intended "to limit, rather than expand, and inland wetlands commission's jurisdiction to regulate activities that impact or affect a wetland area." It found that the DEP and the commission urged too broad a reading of the statute and that the commission improperly denied AvalonBay's permit application because of a potential impact on a wetlands species outside of the regulated buffer areas. It also found that neither side's experts could quantify the extent of the salamander population at the site, thus "the commission based its denial on inconclusive and speculative data." The court sustained AvalonBay's appeal.

A few weeks later, the Connecticut Supreme Court released its decision in Queach Corporation v. Inland Wetlands Commission of the Town of Branford, 258 Conn. 178 (2001). In Queach (which is discussed further below in section V.D of these materials), the Supreme Court upheld the facial validity of amendments to the Branford wetlands regulations expanding the definition of "regulated activity." The Wilton Inland Wetlands Commission and the DEP moved to reargue the September 2001 AvalonBay decision in light of Queach. The court held reargument.

In a decision dated January 15, 2002, Judge Munro reversed her earlier decision. AvalonBay Communities, Inc. v. Wilton Inland Wetlands, 2002 WL 194535. Relying on the similarity between the Wilton definition of "regulated area" and the Branford regulation approved in Queach, as well as the Supreme Court's discussion of the intent of the legislature

in passing the enabling statute, the court held that the commission properly exercised jurisdiction over AvalonBay's permit application because it involved activities that may detrimentally affect the wetlands on the subject property. Turning to the evidence in the record, the court cited the commission's finding that the loss of the spotted salamander "will reduce the biodiversity" of the wetlands and that the loss of the salamander population on-site constituted an irreversible and irretrievable loss of wetland and watercourse resources. The court found that there was substantial evidence in the record to support the commission's finding that the development would impact the biodiversity of the wetland and watercourses by impacting the upland habitat of the spotted salamander. It therefore denied AvalonBay's appeal. AvalonBay's petition for certification to appeal this decision was granted, and the Connecticut Supreme Court heard oral argument in S.C. No. 16807 on April 17, 2003.

Another recent Superior Court decision now pending at the appellate level upheld the denial of a wetlands application based in part on impacts to upland wildlife habitat. In River Bend Associates, Inc. v. Conservation Commission of the Town of Simsbury, 2002 WL 725482 (March 27, 2002), the plaintiff proposed 371 single family homes on 363 acres. The Conservation Commission/Inland Wetlands and Watercourses Agency denied the application, citing concerns over widespread pesticide contamination of the former tobacco fields, insufficient stormwater renovation, and impacts to the upland habitats of vernal pool species. The Superior Court upheld the Commission's decision on each of these grounds, relying in part on Queach. The court cited expert testimony in the record that the site contained wood frog and spotted salamander larvae as well as a high potential for eastern box turtle and ribbon snake, which are listed by the DEP as species of special concern. The court upheld the denial

on the grounds that development in upland areas would fragment the vernal pools from each other and interfere with wildlife migration through the uplands. The Appellate Court certified this case for appeal on June 19, 2002, A.C. No. 23228.

In Landworks Development, LLC v. Town of Farmington Planning and Zoning Comm'n, 2002 WL 377210 (Feb. 14, 2002), the Superior Court upheld the denial of an affordable housing zoning application based in part on concerns for adverse impacts to the upland habitat of two vernal pool species, the wood frog and spotted salamander. Finding that the developer had not performed adequate biological analyses or plan revisions to respond to the commission's concerns, the court approved the commission's categorical adoption of a 400 foot undisturbed setback around the site's vernal pool.

Our courts have also interpreted the Connecticut Environmental Protection Act to permit actions for declaratory and injunctive relief under General Statutes § 22a-16 in order to protect wildlife species. In Animal Rights Front, Inc. v. Plan and Zoning Commission of the Town of Glastonbury, 24 Conn. L. Rptr. 241 (March 4, 1999), the plaintiff sought injunctive relief on the grounds that the defendant commission's approval of a subdivision application was reasonably likely to impair or destroy timber rattlesnakes and whippoorwill. The court denied the defendants' motion to strike the complaint, holding that these species, although classified under the Endangered Species Act as "endangered" and "of special concern," are wildlife and therefore satisfy the definition of "natural resources" under CEPA. The court relied on the Connecticut Supreme Court's decision in Paige v. Town Plan and Zoning Commission, 235 Conn. 448 (1995), that "wildlife" are included in the definition of "natural resources." See also Animal Rights Front, Inc. v. Rocque, 22 Conn. L. Rptr. 26 (April 16, 1998) (denying

motion to dismiss action brought under Conn. Gen. Stat. § 22a-16 to enjoin the killing of fawn deer); but see Animal Rights Front v. Rocque, 63 Conn. App. 207 (affirming summary judgment for Commissioner), cert. denied, 256 Conn. 936 (2001).