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February 18, 2009

To: Senator Ed Meyer, Co-Chairman
Representative Richard Roy, Co-Chairman
Members of the Environment Committee

From: Bill Ethier, CAE, Chief Executive Officer

Re: **Proposed Bill 569, AAC Enhancements to the Inland Wetlands and Watercourses Act**

The HBA of Connecticut is a professional trade association with almost one thousand, three hundred (1,300) member firms statewide, employing tens of thousands of Connecticut citizens. Our members are residential and commercial builders, land developers, remodelers, general contractors, subcontractors, suppliers and those businesses and professionals that provide services to this diverse industry. We also created and administer the Connecticut Developers Council, a professional forum for the land development industry in the state.

The HBA of CT strongly opposes Proposed Bill 569. It is unnecessary as its proposals are already contained in current law and reveals a misunderstanding of current evidence standards applied to applications before local inland wetland and watercourses agencies (IWWA) and appeals of IWWA decisions in the courts.

Under current law, courts have uniformly stated, without exception, that permit applicants bear the burden of proof before a local IWWA. So, on its face the first part of bill 569 states existing law. Applicants must address each and every factor for decision-making, all outlined in the statute, and put on the record before the IWWA their evidence, including expert evidence, testimony and documentation, that addresses each factor and ultimately supports issuance of a permit. The evidentiary standard of review for judging an IWWA decision on appeal is a different matter (see below) However, it is not at all clear what the new term "entitled" to a permit means in the proposed bill. If it means the same thing as the applicant's existing burden of proof to support issuance of a permit, then as stated it is unnecessary. If it means something else, that must be identified and explained, but anything greater than the current law requirement of imposing the burden of proof on applicants seems fraught with a misunderstanding of current law and will create enormous additional uncertainty for the regulated community as well as for the agencies themselves (local IWWAs and DEP).

As to the proposed bill's suggestion that IWWAs consider all relevant evidence brought before such agency, again this states existing law. Local IWWAs already can and do consider all relevant evidence and there is no interpretation of the act and no court decision that suggests the need for this language. Again, this proposal reflects a misunderstanding of evidentiary standards of review of local IWWA decisions on appeal (see below).

While local IWWA do consider all relevant evidence brought before them, on an appeal from an IWWA decision the courts apply the "substantial evidence" rule to determine if the IWWA's decision is supported by the record. Like appeals from other

administrative agencies (zoning commissions, planning commissions, and other local and state agencies), appeals of IWWA decisions are “record appeals” – that is, the evidence the court reviews is the “record” of all the evidence that was before the administrative agency. It is rare that new evidence is allowed to be introduced to the court. Courts, rather than accept and weigh new evidence as the appeal is pursued, must evaluate the evidence in the record that was before the agency. The “substantial evidence” rule was developed to guide the court in reviewing this record in each particular case.

The “substantial evidence” rule for administrative appeals has existed for decades. It applies to any agency decision, whether that decision is to deny or grant a permit, or grant with conditions. This rule for adjudicating administrative appeals should not be confused with other rules of evidence, such as the preponderance of the evidence rule applicable to most civil trials, or the beyond a reasonable doubt rule applicable to criminal trials.

Black’s Law Dictionary describes the substantial evidence rule as “that quality of evidence necessary for a court to affirm a decision of an administrative board. [A] reviewing court will defer to an agency determination so long as, upon an examination of the whole record, there is substantial evidence upon which the agency could reasonably base its decision.” It does demand some quality of evidence to support the agency’s decision – again, whether the decision is to deny or grant a permit. It guards against administrative agencies from making decisions on whimsical, speculative, lay or some other less worthy evidence, especially in the face of contrary expert or technical evidence. It does allow for an agency to choose between conflicting “experts” as long as the expert evidence the agency relies on is specifically applicable to the application before it. These are sound rules that protect the rights of all parties – applicants, intervenors and the agency itself.

Changing the long-standing substantial evidence rule for these appeals would turn decades of administrative law on its head and we urge you to not pursue this dangerous path. It would grossly disrupt consideration by the courts of IWWA decisions. Any new evidence rule made applicable to decisions denying or granting permits would be fraught with unintended consequences and likely decades of litigation to figure out. To change to some other system, such as the civil trial rule of preponderance of the evidence, would create an intolerable regulatory system. Lay IWWA members are not equipped to weigh the preponderance of the evidence standard used in civil actions. There is no oversight by a judge on what evidence is admitted into the record (everything is admitted before an IWWA today) and no jury instructions are provided by a judge to agency members to help guide their decision. Resulting litigation would add tremendous fiscal costs to municipalities.

Connecticut courts have elaborated on the substantial evidence rule in IWWA appeals and, recently, some IWWA appeals have been lost by local IWWA because the agency’s decision could not be supported by substantial evidence on the record. These cases have been the driving force behind these proposals in recent years to change the rules of evidence. However, we strongly assert that the appropriate response should be greater training for IWWAs so they know the rules of evidence and they make sure their decisions are based on “substantial evidence” that is on the record. A wholesale change to decades of administrative law because of a few lost cases is neither warranted nor wise. Please do not support SB 569. Thank you for considering our comments on this legislation.