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March 8, 2010

Senator Edward Meyer, Co-Chair,
Representative Richard Roy, Co Chair,
and Members of Environment Committee
Legislative Office Building
Hartford, CT 06106

RE: Senate Bill 205 (LCO 335): An Act Concerning Enhancements to the Inland Wetlands and Watercourses Act

Senate Bill 123 (LCO 382): An Act Concerning Preserving Natural Vegetation Near Wetlands and Watercourses

Dear Senator Meyer, Representative Roy, and Environment Committee Members:

We are writing in opposition to Raised Senate Bills 205 and 123.

We represent wetlands applicants as well as several wetlands commissions. We successfully represented the applicants in *Fanotto v. Inland Wetlands Comm'n*, 108 Conn. App. 235 (2008); *Toll Brothers, Inc. v. Inland Wetlands Comm'n*, 101 Conn. App. 597 (2007); *River Bend Associates, Inc. v. Conservation and Inland Wetlands Comm'n*, 269 Conn. 57 (2004); and *AvalonBay Communities, Inc. v. Inland Wetlands Comm'n*, 266 Conn. 157 (2003). We have also successfully represented town and wetlands commission interests as town attorney and special counsel in several significant wetlands matters including *River Sound Development, LLC v. Old Saybrook Inland Wetlands and Watercourses Comm'n*, Superior Court, J.D. of Middlesex, Docket No. CV 06 4005349S (Feb. 19, 2008) (Aurigemma, J.). In addition, we have appeared before wetlands commissions in over 100 municipalities. Thus, we have significant experience applying the provisions of the Inland Wetlands and Watercourses

Act (the "Act") from the perspective of applicants and wetlands commissions. We have prepared this letter on our own time, not at the request of any client or organization.

Raised Senate Bill 205

We strongly support protection of Connecticut's valuable wetlands and watercourses, but we oppose the proposed language of the Bill as both unnecessary to protect those resources and potentially confusing to homeowners, local commissions, and the courts. The proposed language is unnecessary and would provide no wetlands protection benefit over the existing statutory language. More likely, the proposed changes would be perceived to carry some new intended meaning and be used, in litigation, as a blunt instrument to subsume the more complete and thoughtful balance between wetlands protection and the property rights of Connecticut residents that was struck by the original 1972 legislative findings in Conn. Gen. Stat. § 22a-36.

Specifically, Sections 1 and 2 (Lines 43-45) propose to add statements declaring it the "public policy of the state to preserve the inland wetlands and watercourses of the state and to prevent the despoliation and destruction of such inland wetlands and watercourses." The language sounds good but the real benefits from the language are more illusory and potentially counter-productive. First, it is already the express policy of the State to protect our wetlands and watercourses. *See Unistar Props., LLC v. Conservation and Inland Wetlands Comm'n*, 293 Conn. 93 (2009). However, that protection is to be balanced against the property rights of homeowners and the economic growth of the state. That balance was thoughtfully struck in 1972 and has successfully preserved thousands of acres of sensitive land. Second, it must be recognized that sometimes local commissions, even with good intentions, ostensibly act to protect wetlands based only on vague notions of harm that are not supported by the facts. In those instances, the commission's denial does not actually provide wetlands protection nor does it prevent wetlands despoliation (because there is, in fact, no adverse impact); rather, it merely serves to frustrate the homeowner's desire to use his property in a responsible manner. Such instances are counter-productive because they (1) block legitimate activities not intended to be prohibited by the Act; (2) provide no wetlands benefit; (3) increase public frustration with the Act as a whole; and (4) make an already arduous process even more difficult, time-consuming and expensive. Strong public support is one of the great strengths of the Act and it should not be jeopardized by tinkering with § 22a-36 in a way that would be perceived to shift the burden against homeowners.

Section 3 (Lines 149-158) adds a requirement that local commissions consider "all evidence" presented to them including but not limited to a laundry list of potential items. This addition serves only to clutter the statute with unnecessary text. There is no interpretation of the Act and no court decision that suggests the need for this text. It is a purported solution in search of a problem. Local commissions do not operate under the Rules of Evidence so they

do not need special permission -- or a mandate -- to consider evidence; anything that is submitted to them is automatically part of the record. This language wrongly seeks to stack the deck by emphasizing the importance of certain categories of evidence.

Raised Senate Bill No. 123

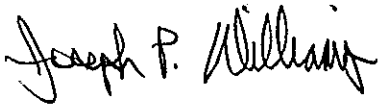
It is important to keep in mind that local commissions already have the power to regulate *any* activity, including cutting natural vegetation in an upland review area, if it would result in adverse impacts to wetlands or watercourses. In our experience, local commissions routinely review impacts to upland vegetation and the wetlands protection functions they can provide. Local commissions often contact the Department of Environmental Protection ("DEP") for advice regarding riparian corridors or rely on existing DEP guidance documents (as well as expert testimony) to evaluate riparian corridor functions that protect the rivers. We applaud efforts by local commissions and homeowners to avoid wetlands impacts. Opposition to this Bill should not be perceived as opposition to protecting Connecticut's wetlands, watercourses and the functions provided by surrounding natural vegetation. Moreover, recent Connecticut caselaw confirms the authority of a local wetlands commission to request information regarding upland review areas and to act on it.

Second, it is very important for the legislature to understand and carefully consider exactly how far reaching this amendment would be. It could prohibit any cutting or trimming of vegetation (even cutting in accordance with good forestry practice) within 100 feet of a wetland or watercourse. This would include small pocket wetlands in someone's back lot or within 100 feet of an intermittent watercourse that may run only in the spring or fall. Put another way, a hypothetical homeowner with a wetland the size of a pin point would not be allowed to cut brush or a tree (or even invasive species) in an approximately three-quarter acre area around that point. A large wetland or stream bank would obviously result in a much larger prohibited area. The point is that the existing statutes give local commissions all the authority and discretion necessary to protect natural upland vegetation without imposing the sweeping restrictions proposed in this bill.

Finally, the Act does not define "destruction" as used in Line 128.

We respectfully oppose Raised Senate Bills 205 and 123 and suggest that any effort to improve the Bills through stakeholder input would be better served in a long session rather than the current session.

Very Truly Yours,



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