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Business*

February 22, 2010

To: Senator Ed Meyer and Representative Richard Roy, Co-Chairs, and members of the Environment Committee

From: Bill Ethier, CAE, Chief Executive Officer

Re: RB 120, An Act Authorizing Review of the Department of Environmental Protection's Guidance Statements and Policies by the General Assembly's Regulation Review Committee

The HBA of Connecticut is a professional trade association with 1,100 member firms statewide, employing tens of thousands of Connecticut citizens. Our members are residential and commercial builders, land developers, home improvement contractors, trade contractors, suppliers and those businesses and professionals that provide services to our diverse industry. We estimate that our members build 70% to 80% of all new homes and apartments in the state.

We strongly support RB 120 as a necessary step in improving the efficiency and efficacy of government and to ensure DEP's work serves the best interests of all of Connecticut's citizens and the regulated community.

The DEP has developed guidance manuals, documents and policies on many matters that significantly affect the regulated community. These manuals, documents and policies have the force of regulations on businesses, individuals and municipalities, yet to our knowledge they have not gone through the normal process of regulatory review. The normal process of regulatory adoption includes, of course, notice and comment rulemaking, and reviews by administrators outside the producing agency (i.e., OPM, Governor's Office, Attorney General's office). These reviews all serve as an important check and balance on the producing agency's regulations. And, CT's unique system of legislative oversight by the Regulations Review Committee, is also an important and critical check and balance to ensure an agency is appropriately doing the job the legislature has charged it to do. Last year, the legislature also adopted a new check and balance that requires agencies that produce regulations to analyze the impacts on small businesses (PA 09-19).

DEP has used guidance manuals, documents and policy statements extensively to carry out its desired controls over the regulated community. These include, but are not limited to, the following examples:

- DEP Stormwater Quality Manual (2004) – regarded as biblical by municipal commissions
- DEP Soil Erosion Guidelines (2002) – likewise considered gospel by local governments; both the 2004 Manual and 2002 Guidelines are incorporated into DEP's Stormwater General Permit, which also falls outside the normal regulatory review process.

- DEP's Stormwater General Permit itself (existing and pending) – refers all stormwater permit filings for endangered species review, despite the fact that the law limits its applicability to state projects. Somewhere along the line, DEP took the position that its approval of a Stormwater General Permit for private activity makes all stormwater permits state projects for endangered species purposes.
- DEP Model Inland Wetlands Regulations & Upland Review Manual
- DEP Guidance Document for the Design of Large On-Site Wastewater Renovation Systems (April 2007)
- DEP's consolidated instructions and form for filing water diversion permits – requires a variety of things that are not listed in the statutes or regulations but if you don't follow it your application will be rejected
- DEP's consolidated instructions and form for filing stream channel encroachment permits –same as above
- Bill Hogan's 2008 memo to municipalities laying out DEP's policies and rules for sewer extensions, directing (among other things) that all such work must comply with the Locational Guide Map of the state's Plan of Conservation & Development; the memo was not even published yet has had a huge effective regulatory impact on municipalities and private developments associated with sewer extensions. Moreover, the memo is legally wrong.
- DEP's conflicting and changing design parameters for manure composting facilities. Asked of DEP staff why a subsequent set of design criteria was much more stringent than the first, neither of which was vetted through the regulatory process, the response was "that's how we do it."

Administrative agencies, DEP included, can and must regulate only those matters delegated to them by the legislature. Moreover, they must regulate in a way that follows proper procedure. Guidance materials help the regulated community and the general public understand how to do certain things, what factors to look for or consider when undertaking activities and present viable compliance options for the regulated community. They can be very useful. **But when guidance manuals, documents and policy statements or letters have the force of regulations, they should be subject to the same checks and balances as regulations that carry the regulation moniker.**

Raised Bill 120 is an important small step in ensuring our government works for all of CT's citizens and the regulated community. It does not automatically require any guidance statements or policies to go through the normal regulatory process. It adopts only a petition process whereby a sufficient number of affected persons may seek a public hearing to review a statement or policy before the Regulations Review Committee. Then, the only impact is a potential recommendation from Regs Review to the agency. **This seems like a small step to create some necessary outside oversight of the regulatory controls and mechanisms wielded by DEP.**

We strongly urge you to pass RB 120. Thank you for the opportunity to comment on this legislation.