



STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION



Public Hearing – March 7, 2011
Environment Committee

Testimony Submitted by Acting Commissioner Susan Frechette
Department of Environmental Protection

Raised Senate Bill No. 1114 - AN ACT REVISING THE DEFINITION OF TIDAL WETLANDS AND THE HIGH TIDE LINE

Thank you for the opportunity to present testimony regarding Raised Senate Bill No. 1114 - AN ACT REVISING THE DEFINITION OF TIDAL WETLANDS AND THE HIGH TIDE LINE. The Department of Environmental Protection (Department) offers the following testimony.

We certainly understand that there may be issues associated with the Connecticut General Statutes §22a-359(c) definition of the high tide line, which establishes the Department's coastal permit jurisdiction. The high tide line is currently defined as a mark indicating the maximum height reached by a rising tide, as established by one of several field-determined methods. There is no fixed elevation or published tidal datum that exactly corresponds to the current statutory definition, which has caused some concern within the regulated community. More specifically, by respondents in enforcement proceedings, two of which are currently pending before the Connecticut Supreme Court. Nonetheless, in general we have found that the jurisdictional limit provided by the current definition is workable and allows for protection of significant coastal resources.

Moreover, the language of the Raised Bill creates a number of significant problems. Section 3 of the bill would redefine the high tide line as "Mean Higher High Water," (MHHW), which is an elevation described by NOAA as the average of the higher high water height of each tidal day observed over the National Tidal Datum Epoch. By definition, MHHW as an average is lower than the current statute's "maximum height reached by a rising tide," so this proposed bill effectively rolls back DEP permit jurisdiction and reduces protection for coastal resources. Also, the bill fixes MHHW at the current 2001 tidal epoch, which means that permit jurisdiction will not adapt as sea level rises in future tidal epochs, which are revised approximately every 20 years.

In addition, we believe Sections 1 and 2 of the Raised Bill are unnecessary. The rationale behind these sections of the proposal is presumably based upon the difficulty in locating the elevation of "local extreme high water" under the Tidal Wetlands Act. However, this statutory term is defined in the Tidal Wetlands Regulations, RCSA §22a-30-2, as the elevation of the one year frequency tidal flood at a particular location, as shown on the most recently adopted U.S. Army Corps of Engineers tidal flood profile.

Although the tidal flood profile has not been updated in accordance with the current tidal epoch, its incorporation in the Tidal Wetlands Regulations still provides a reasonable limit for

jurisdiction under the Tidal Wetlands Act. Eliminating this limit and instead relying on the statutory plant list alone could cause significant overregulation, since the listed tidal wetland vegetation includes plants that are capable of growing in upland habitats all over the state, such as poison ivy (*Rhus radicans*).

While the present language of this bill is problematic, the Department is quite open to considering alternative means of defining or determining the location of the high tide line. The goal should not be to determine a "true" high tide line, since that term has no geological or scientific significance, but to agree on a jurisdictional line that will capture all activities that can reasonably be expected to affect coastal resources and uses without creating undue regulatory burdens or uncertainty. For example, nearby states such as Rhode Island and New Jersey apply a substantial buffer or setback from tidal waters or resources to ensure adequate resource protection.

Another example of a promising approach is the proposal submitted to the Department on February 28, 2011 by the Connecticut Association of Land Surveyors (CALs) to define the high tide line as the elevation of mean high water in the most recent tidal epoch, plus 1.8 feet. This proposal would approximate the existing jurisdictional line, but could be determined accurately and definitively by survey in many areas. However, anomalies often occur as one moves further inland up tidal creeks, into estuaries and embayments, and up tidally influenced rivers. In addition, since the Department does not have access to an in-house surveyor, it may be difficult to field-determine jurisdiction under the CALs proposal in the context of an enforcement inspection, as would also be the case for a property owner who wishes to consider a waterfront project without first hiring a surveyor. Of course, any and all methods of determining coastal permit jurisdiction will reflect advantages and disadvantages, and we would be happy to pursue further discussion of the CALs proposal.

Finally, the Committee should know that the Department's Office of Long Island Sound Programs has undertaken a field project to observe locations on the ground of elevations determined by different means, including the one proposed by CALs, and to compare these observations with the coastal resources and the marks left by the intersection of the tide with the land as may be found at these sites. In this way, we will be in a position to recommend an alternative to the existing statutory definition, which will provide regulatory certainty, while continuing to protect valuable resources.

In summary, the Department would welcome the opportunity to work with the proponents of this bill to discuss coastal permitting jurisdiction further.

Thank you for the opportunity to present the Department's views on this proposal. If you should require any additional information, please contact the Department's legislative liaison, Robert LaFrance, at (860) 424-3401 or Robert.LaFrance@ct.gov.