Janet P. Brooks
Attorney at Law, LLC
1224 Mill St., Bldg. B, Suite 212
East Berlin, Connecticut 06023

February 24, 2016

Environment Committee
Connecticut General Assembly
Legislative Office Building
Hartford, Connecticut

Re: Public hearing on February 24, 2016 on Raised Bill #141, An Act Concerning Revision of Definitional, Timing and Procedural Provisions of the Inland Wetlands and Watercourses Act

Dear Members of the Environment Committee:

Thank you for the opportunity to submit this letter into the public hearing on Raised Bill #141. I write in opposition to most of the proposed revisions. At the end of the letter I indicate the two minor changes to which I have no objection.

I write this from the perspective of someone who has practiced environmental law in the state since 1981, with eighteen years in the Attorney General's Office representing DEP and enforcing the state environmental laws, followed by a decade in private practice focusing on environmental and land use law. While in the AG's office I coordinated the wetlands practice and helped create and offered the legal training as part of DEP's training of wetlands commission members from 1990 – 2006. Since 2002 I have offered two training workshops each year to wetlands members at CACIWC's (the CT Association of Conservation and Inland Wetlands Commissions) annual meeting. I author a standing column on legal issues facing wetlands commissions in the CACIWC quarterly newsletter and have a blog on Connecticut wetlands law. I have served on the Council on Environmental Quality since 2009.

This bill proposes to dismantle the state oversight of municipal wetlands commissions provided by DEEP. It does so by removing DEEP's authority to issue orders pursuant to CGS § 22a-6 (unilateral orders) and § 22a-7 (cease and desist orders) of the general statutes. See § 7 of RB #141. It removes DEEP's authority to revoke the authority of a municipal wetlands commission which has "consistently failed to perform its duties under" the wetlands act, as currently established in CGS § 22a-42d. See § 9 of RB #141. It removes DEEP's authority to review and act on municipal applications where the agency or its agent has failed to act within mandated timeframes, as currently established in CGS § 22a-42a (c) (1). See § 4 of RB #141.

The current statutory scheme envisions DEEP as the backstop to deviant, outlier municipal action. Where the town wetlands commission fails to enforce its own regulations, the citizens of that town won't be harmed because DEEP can step in and issue the needed orders. If that wetlands commission "consistently" fails to do its job, DEEP can remove the authority of the town to regulate its own wetlands and watercourses. I've seen a handful of examples where

Tel. (860) 828-2092 Fax (860) 256-8214
Website: www.attorneyjanetbrooks.com
E-mail: jb@attorneyjanetbrooks.com

DEP/DEEP stepped up and issued orders. They generally involved large, complicated sites where DEEP's expertise could match the challenges the sites posed. Similarly, DEEP has investigated commissions for alleged failure to carry out the law. These have not resulted in revocation of authority but implementation of remedial action, training, change of agency conduct, procedure and the like. That is a perfect example of how DEEP can play a very meaningful role in supervising municipal implementation of the wetlands law.

Both of these tools are seldom used. The deterrent effect of these tools, however, is immeasurable. It is always within the Commissioner of DEEP's discretion when to use these extraordinary tools. And that discretion is not second-guessed by the courts. When citizens have sued DEP/DEEP for failure to enforce environmental laws, the Attorney General's Office has successfully defended DEEP. Federal and state courts have deferred to DEEP's "prosecutorial discretion" not to pursue enforcement.

Since DEEP can choose to enforce (or not enforce) based on its staff and budget (or lack of them), a permanent dismantling of the state supervision of municipal implementation is unnecessary and unwarranted.

The bill also proposes to remove DEEP's authority to process wetlands application where a municipal commission has failed to act in accordance with mandated deadlines. The irony is that DEEP has no deadlines to process applications at all. I am aware of two instances in the past few decades where DEEP has processed municipal wetlands applications.

The proposal to counterbalance the removal of DEEP authority by the creation of the right to sue municipalities for their failure to implement the wetlands act correctly is an inadequate remedy. See § 5 of the RB #141. This bill proposes to curtail the prosecutorial discretion of towns and allow their motivations to enforce or not enforce the law to be subject to court scrutiny. This bill sets up a system where each individual complainant in individual suits complains to the court. ("The commission took too long to process my application." "It didn't require my neighbor to get a permit before constructing a shed on his property." It didn't require remediation of the brook on my property.") There is already a citizen suit provision in the wetlands law to sue the person who undertakes a regulated activity without a permit or in violation of a permit and allows the court to order remediation. See CGS § 22a-44 (b). The existing solution to untimely municipal action, to have DEEP process the application is inadequate, but the proposal to have the applicant go to court is even worse. If the bill continues to proceed, at the least it should incorporate this proposed provision into CGS § 22a-44 (b) and harmonize it with the current citizen suit provisions.

The bill proposes to eliminate various procedures which daylight the process of amending wetlands maps. This doesn't address the problem. Some towns do not officially amend their maps. They consider changes to wetlands boundaries informally and unofficially when considering permit applications. But after the application is acted upon *and especially if the permit is denied*, there is no permanent change to the official wetlands map. Changes can occur in agency conduct. There is no statutory impediment to conducting a public hearing on a wetlands map amendment simultaneously with the public hearing on an application. The value in one official wetlands map is that everyone is on the same page: the commission which enforces the wetlands law, the property owners who want to use their property and the neighbors/concerned citizens who want that use to not harm wetlands and watercourses. Less notice, less access to proposed changes, and less opportunity to participate in the amendment process do not further that goal.

These proposed changes have not been vetted by the affected stakeholders. This is most clear when examining the expansion of the jurisdiction of the wetlands law to include "hydric soils." I contacted five soil scientists seeking their input. One of them forwarded my request to the Soil Science Society of Southern New England which certifies soil scientists. I contacted the Connecticut Association of Wetlands Scientists and CACIWC. I spoke with the CT Homebuilders Association and with the Connecticut Farm Bureau Association.

None of them had heard of this proposal prior to the bill being filed nor did any of them know why hydric soil was being added.

The last time that major statutory changes were enacted a task force stakeholders met to raise issues of concern. The stakeholders might have created their own wish list of salutary changes to the wetlands act.

I have no objection to the change of public notice required to be issued by DEEP on wetlands permits to state agencies. See § 2 of RB #141. Similarly, the substitution of the word "renew" for "extend" is innoccuous. See § 4 of RB #141 addressing CGS § 22a-42a (c) (2).

Thank you for consideration of my comments.

Sincerely,

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