For the Environment Committee
Testimony of Alicea Charamut, Executive Director
February 27, 2023

Rivers Alliance was formed to fight for sound water policies at the state and federal levels, to provide education on water resources, and to advocate for any person or group striving to protect water. If you want clean, free-flowing and healthy rivers, and high-quality drinking water, Rivers Alliance is here to help.

Thank you for the opportunity to provide testimony on the following raised bill before you today.

HB 5616 – AA IMPROVING STANDARDS FOR INLAND WETLAND COMMISSION AUTHORITY MEMBERSHIP AND ENFORCEMENT

Rivers Alliance *supports the intent* of this bill, but has **strong objections to Sections 2** and **requests modifications to Sections 3 and 4**.

Last year was the 50th anniversary of Connecticut's Inland Wetlands and Watercourses Act which recognizes that our wetlands and watercourses are an "indispensable and irreplaceable but fragile natural resource" and provides for "an orderly process to balance the need for the economic growth of the state and the use of its land with the need to protect its environment and ecology in order to forever guarantee to the people of the state, the safety of such natural resources for their benefit and enjoyment and for the benefit and enjoyment of generations yet unborn."

Connecticut is and should be proud of the giant leap it took 50 years ago that put our state in the forefront of protecting our precious water resources. This measure now has Connecticut ahead of many other states in our ability to protect these resources in the face of climate change. There is room for improvement, however; particularly now that we're experiencing the impacts of climate change.

Rivers Alliance believes there is some low-hanging fruit that can be addressed in this bill, but some of the proposed language changes will set our processes back.

One of the services that Rivers Alliance provides is assistance to citizens and local groups that have concerns about land use applications in their towns. Those that serve on our local land-use boards are public servants that perform thankless jobs. Many of these folks are members, friends and partners of Rivers Alliance. We rely on their expertise and real-world experience. The majority of issues brought to Rivers Alliance have exposed flaws in our process or a lack of knowledge on the part of a commission. We have been working to identify the commonality and underlying cause of

problematic process failures have brought people to Rivers Alliance for help. Our suggestions and modifications are based on specific recommendations that Rives Alliance has developed.

Section 1 – DEEP Inland Wetlands Program is severely under-resourced

This section directs DEEP to develop training on any statutory changes. This is necessary considering some of the sweeping changes proposed in this bill. It's important for the committee to understand that DEEP's Inland Wetlands program is severely under-resourced. Until recently, the program had one dedicated staff member. That person was promoted to a position outside of the program with no indication as to whether the vacant position will be filled.

For decades there has been insufficient staff and financial resources to support municipal implementation of the Inland Wetlands and Watercourses Act (IWWA.) DEEP is responsible for monitoring, training and supporting 170 municipal wetlands agencies. There is also a dire need to update inland wetland and watercourses regulations, reporting requirements, and model regulations; and to identify process improvements for data collection in order to improve the tracking of the health and level of protection of Connecticut's Inland Wetlands and Watercourses.

All with a staff of ZERO at DEEP dedicated to the program.

There has never been a time where protecting our inland wetlands and watercourses is more important. Now more than ever, land use decisions that impact our wetlands and waterways should be considered through the lens of optimizing resource protection and nature-based solutions to align with recommendations of the Governor's Council on Climate Change and to meet Nitrogen reduction goals for Long Island Sound. Protecting and enhancing our existing natural resources is the easiest and most cost effective way to combat the impacts of climate change. When functioning in their healthy, natural state our wetlands provide for flood mitigation and drought resiliency. Our watercourses connect ecosystems across Connecticut's landscape and beyond.

Attached to this testimony is the inspiring preface to our IWWA. I encourage the members of the committee to read it. I ask you then to consider that it is the responsibility of an estimated 1,500 dedicated, volunteer commissioners in each town to uphold our IWWA – **without technical assistance and support from DEEP.**

Section 2 – Undefined terms

The proposed changes to 22a-41(b)(1) and (2) make changes to terms that are already defined in statute and regulations and well understood by commission members. "Feasible" and "prudent" are defined in the statute and "significant impact" is defined in Inland Wetland and Watercourses Regulations. All of these terms are included in adopted, local regulations. **We strongly encourage**

the committee eliminate the proposed language changes of this section if this bill is to move forward.

The term "measurable" as a replacement for "significant" is both too broad and too exclusionary. This term could put a heavy burden on commissions or applicants or both. Would a commission have to hire experts to determine if an impact is measurable? If an impact is measurable to a miniscule degree could that impact be considered significant enough to disturb the wetland or watercourse?

The term "reasonable" to replace "feasible and prudent" is undefined and too subjective.

We do not believe these changes will make protections for our inland wetlands and watercourses stronger, but will set our process for land-use applications back decades.

In regard to changes proposed to 22a-41(c) and (d), it is important to understand the history behind this small, but important bit of law. In Avalonbay Communities, Inc. v. Wilton Inland Wetlands Commission, the Supreme Court ruled that the IWWA, "protects the physical characteristics of wetlands and watercourses and not the wildlife, including wetland obligate species, or biodiversity." In response to the ruling, PA 04-209 was passed the following year which defined wetlands to include aquatic plant and animal life and habitats in the wetlands. The language that exists today was negotiated between DEEP, the Connecticut Association of Conservation and Inland Wetlands Commissions, the Connecticut Homebuilder's Association, and many other stakeholders.

It appears that this change is intended to restore protection of plants and animals and their habitats back into statute and reestablish the IWWC's ability to regulate these resources.

In the 20 years since the Avalonbay ruling, biodiversity has been declining at an alarming rate. The biggest driver of biodiversity loss is how we use our land and water. Rivers Alliance supports improving the IWWA so that wetland obligate species and biodiversity can once again be considered. We are willing to work with the committee and stakeholders to that end.

Proposed language that would strengthen this section

There is a change to 22a-41(b)(2) that would provide clarification that will fully protect the public's right to have feasible and prudent alternatives considered. The Connecticut Appellate Court handed down its decision in Purnell v. Inland Wetlands early this year, holding that applicants do not need to provide an analysis of feasible and prudent alternatives, and local wetlands agencies do not have to consider those alternatives when a hearing is held upon a petition by 25 members of the public, or the local agency determines it is in the public interest to do so. Cutting off the public's right to have that presentation and consideration of feasible and prudent alternatives, something that may be essential to saving natural resources from destruction, was never the intent of the General Assembly

in enacting the law. Attached is a Connecticut Law Tribune commentary that explains the intricacy of the ruling.

Inserting the language below will properly express what we believe the General Assembly intended, protecting the public's right to have feasible and prudent alternatives considered when a wetlands agency determines the public interest requires a hearing, or 25 or more members of the public petition to have a hearing.

> (b) (1) In the case of an application which received a public hearing pursuant to (A) subsection (k) of section 22a-39, or (B) a finding by the inland wetlands agency that the proposed activity may have a significant impact on wetlands or watercourses, or (C) a finding by the inland wetlands agency that a public hearing regarding such application would be in the public interest, or (D) receipt of a petition for a hearing signed by at least twenty-five persons requesting such a hearing, a permit shall not be issued unless the commissioner finds on the basis of the record that a feasible and prudent alternative does not exist. In making his finding, the commissioner shall consider the facts and circumstances set forth in subsection (a) of this section. The finding and the reasons therefor shall be stated on the record in writing.

Section 3 – Give volunteer commissioners time.

We fully support the change that every member of an IWWC should complete the comprehensive training program. The program is now available on-line and can completed at the member's leisure. The training is comprised of 8 modules. Each module takes approximately an hour to complete.

We recommend, however that members: (1) be given a year to complete the training, (2) have to complete the training every five years after completing the initial training and (3) include a stipulation that training must be readily available. These changes provide volunteer commissioners with a reasonable timeframe.

> (d)[At least one] Each member of the inland wetlands agency [or] and staff of the agency shall be a person who has completed the comprehensive training program developed by the commissioner pursuant to section 22a-39 as long as the training is readily available. Existing members of any Commission responsible for Inland Wetlands must complete the comprehensive training program no later than June 1, 2025 and new commissioners must complete the comprehensive training program within one year of being appointed to the commission as long as said training is readily available. Each member shall complete the training not less than every five years, thereafter.

Section 4 – Unintentional burden

This section makes action on wetlands violations a requirement instead of a mere suggestion and increases penalties for violators. We support this change. However, a written order is rarely an agent or agency's first course of action – nor should it be. The majority of violations are residents who are simply unaware that their activity may be a wetlands violation and, in most cases, the issue is satisfactorily resolved through a friendly conversation.

The change from "may" to "shall" must be followed by language that allows for non-punitive resolution prior to a formal written order. Otherwise, municipalities and commissions will be buried with paperwork by issuing orders for even minor, easily resolved violations. This would be an incredible burden.

(a) If the inland wetlands agency or its duly authorized agent finds that any person is conducting or maintaining any activity, facility or condition which is in violation of sections 22a-36 to 22a-45, inclusive, or of the regulations of the inland wetlands agency, the agency or its duly authorized agent [may] shall issue a written order, by certified mail, to such person conducting such activity or maintaining such facility or condition to cease immediately such activity or to correct such facility or condition unless such person agrees to promptly address the violation and/or submit an application in a timeframe that is satisfactory to the agency or duly authorized agent.

We support the increase in penalties wetland violations but would prefer that any penalties be utilized solely for Inland Wetlands program activities.

Thank you again for raising this bill and recognizing importance of updating Inland Wetland and Watercourses Act and for allowing the public to provide their input and thoughts on the process. This is a very important issue for Rivers Alliance and we are happy to work with the committee on improving our statutes.

ATTACHMENT - Sec. 22a-36. Inland wetlands and watercourses. Legislative finding.

The inland wetlands and watercourses of the state of Connecticut are an indispensable and irreplaceable but fragile natural resource with which the citizens of the state have been endowed. The wetlands and watercourses are an interrelated web of nature essential to an adequate supply of surface and underground water; to hydrological stability and control of flooding and erosion; to the recharging and purification of groundwater; and to the existence of many forms of animal, aquatic and plant life. Many inland wetlands and watercourses have been destroyed or are in danger of destruction because of unregulated use by reason of the deposition, filling or removal of material, the diversion or obstruction of water flow, the erection of structures and other uses, all of which have despoiled, polluted and eliminated wetlands and watercourses. Such unregulated activity has had, and will continue to have, a significant, adverse impact on the environment and ecology of the state of Connecticut and has and will continue to imperil the quality of the environment thus adversely affecting the ecological, scenic, historic and recreational values and benefits of the state for its citizens now and forever more. The preservation and protection of the wetlands and watercourses from random, unnecessary, undesirable and unregulated uses, disturbance or destruction is in the public interest and is essential to the health, welfare and safety of the citizens of the state. It is, therefore, the purpose of sections 22a-36 to 22a-45, inclusive, to protect the citizens of the state by making provisions for the protection, preservation, maintenance and use of the inland wetlands and watercourses by minimizing their disturbance and pollution; maintaining and improving water quality in accordance with the highest standards set by federal, state or local authority; preventing damage from erosion, turbidity or siltation; preventing loss of fish and other beneficial aquatic organisms, wildlife and vegetation and the destruction of the natural habitats thereof; deterring and inhibiting the danger of flood and pollution; protecting the quality of wetlands and watercourses for their conservation, economic, aesthetic, recreational and other public and private uses and values; and protecting the state's potable fresh water supplies from the dangers of drought, overdraft, pollution, misuse and mismanagement by providing an orderly process to balance the need for the economic growth of the state and the use of its land with the need to protect its environment and ecology in order to forever guarantee to the people of the state, the safety of such natural resources for their benefit and enjoyment and for the benefit and enjoyment of generations yet unborn.

Attachment 2 – Connecticut Law Tribune Commentary

Inland Wetlands Law Needs an Easy Fix to Protect the Public's Interest

The Connecticut Appellate Court handed down its decision in Purnell v. Inland Wetlands early this year, holding that applicants do not need to provide an analysis of feasible and prudent alternatives, and local wetlands agencies do not have to consider those alternatives when a hearing is held upon a petition by 25 members of the public, or the local agency determines it is in the public interest to do so. Following Purnell, the only time local agencies need to consider alternatives is when the agency holds a hearing because it found that the application may have a "significant impact on wetlands or watercourses".

Cutting off the public's right to have that presentation and consideration of feasible and prudent alternatives, something that may be essential to saving natural resources from destruction, was never the intent of the General Assembly in enacting the law. The appellate court in Purnell, however, was bound by the plain language of the statute. The problem is one of careless drafting. It happens. It can and must be fixed to carry out the objectives of Connecticut's Environmental Protection Act.

CEPA is remedial and protective. "[T]he policy of the state of Connecticut is to conserve, improve and protect its natural resources and environment and to control air, land and water pollution in order to enhance the health, safety and welfare of the people of the state." Sec. 22a-1a. Courts have consistently broadly interpreted CEPA to carry out its intent. "Statutes such as the EPA are remedial in nature and should be liberally construed to accomplish their purpose." Manchester Environmental Coalition v. Stockton, 184 Conn. 51,57, 441 A.2d 68 (1981).

The legislative history of the feasible and prudent alternatives requirement reveals that

many legislators were concerned that the feasible and prudent alternatives analysis requirement did not go far enough. They wanted even more protection. Not a single word was spoken or written about limiting the requirement in any way. In reading the entire history, it can be fairly said that no one back then in drafting the law could have imagined a scenario in which an applicant could be exempt from the requirement.

The feasible and prudent alternatives requirement in Sec. 22a- 41(b)(1) is "action forcing" — it is intended to force the applicant and force the decision maker to consider if there might be a better way.

The Purnell decision eviscerates the remedial objective of CEPA. When citizens rise up in protest and the statutes protect them with a mandatory hearing, there is a fortiori a need to have those alternatives in front of the tribunal.

We urge the General Assembly and the Connecticut Council of Environmental Quality, which has the authority pursuant to Sec. 22a-12 of the General Statutes to offer "a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation" to address this urgent need for corrective legislation.

The fix is easy. Inserting the italicized language below will properly express what we believe the General Assembly intended, protecting the public's right to have feasible and prudent alternatives considered when a wetlands agency determines the public interest requires a hearing, or 25 or more members of the public petition to have a hearing:

(b) (1) In the case of an application which received a public hearing pursuant to (A) subsection (k) of section 22a-39, or (B) a finding by the inland wetlands agency that the proposed activity may have a significant impact on wetlands or watercourses, or (C) a finding by the inland wetlands agency that a public hearing regarding such application would be in the public interest, or (D) receipt of a petition for a hearing signed by at least twenty-five persons requesting such a hearing, a permit shall not be issued unless the commissioner finds on the basis of the record that a feasible and prudent alternative does not exist. In making his finding, the commissioner shall consider the facts and circumstances set forth in subsection (a) of this section. The finding and the reasons therefor shall be stated on the record in writing.

And, most importantly, this amendment to fix the ambiguous drafting that led to the unfortunate Purnell decision will protect the environment.