Inland Wetlands and Watercourses Regulations

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Statutory Framework

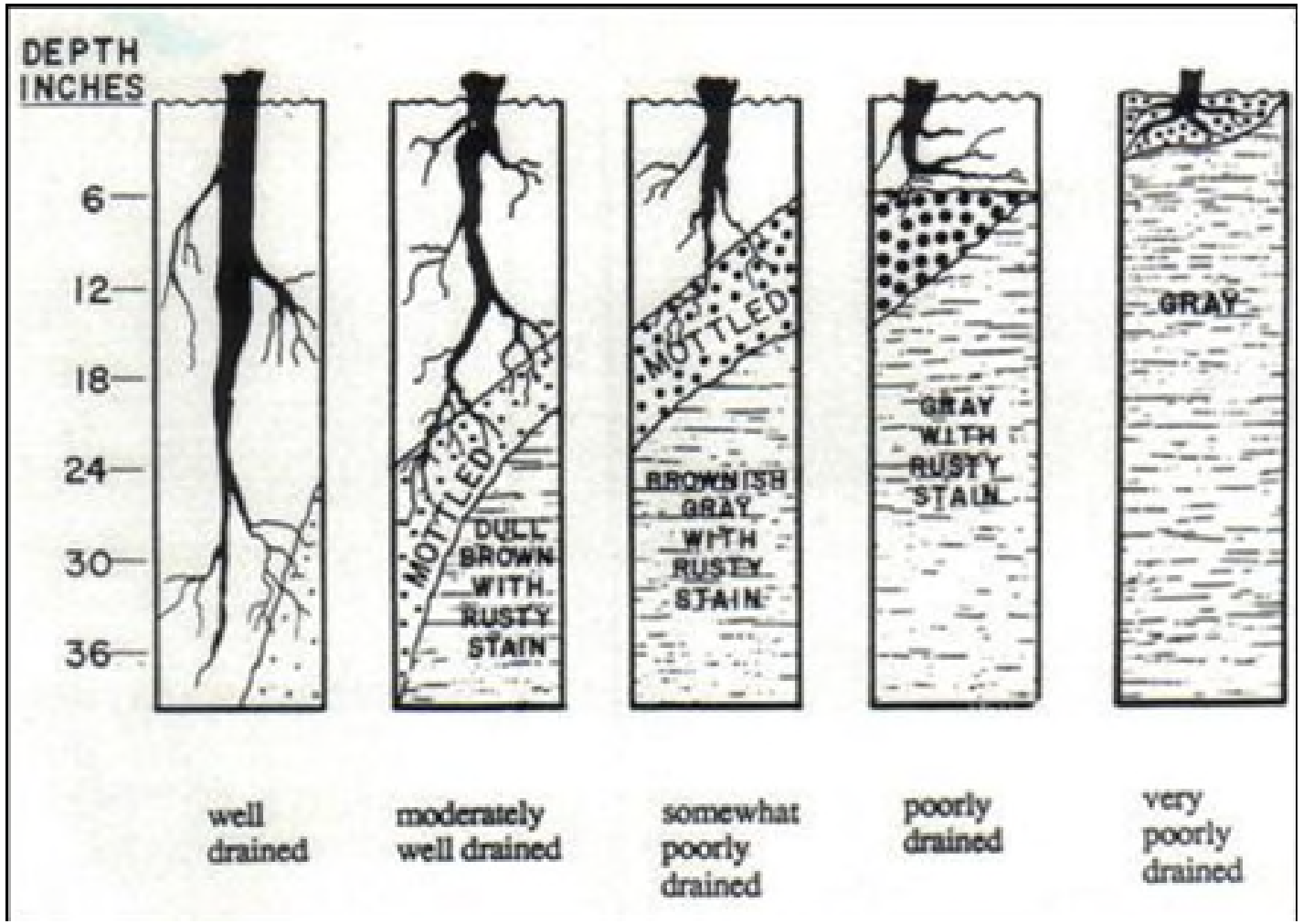
- Operative statutes: Conn. Gen. Stat. Chapter 440 (§§ 22a-36 – 22a-45d)
- Municipal regulation is required
- May combine agencies, but each “wears own hat”
- Training of at least one agency or staff member is theoretically required, *but no impact on agency’s decision if they are not*
- Agent may issue permits for minimum-impact activities in upland review areas <u>if trained</u>
- Anyone receiving a permit from the IWEO must publish notice within 10 days. “Any person” may appeal the permit to the IWWA within 15 days after publication. Appeal must be considered at IWWA’s next regular meeting that is “no earlier than three business days” after the filing of the appeal.

Principal Definitions (C.G.S. § 22a-38)

- "Wetlands"
- Defined exclusively by soil types:
- • Poorly drained
- • Very poorly drained
- • Alluvial
- • Floodplain
- Land must not be regulated under the state's Tidal Wetlands Act (C.G.S. §§ 22a-28 through 22a-35)
- Federal wetlands definition requires consideration of hydrology and vegetation; state's definition does not

"Watercourses"

Broad range: rivers, streams, brooks, waterways, lakes, ponds, marshes, swamps, bogs and all other bodies of water, natural or artificial, vernal or intermittent, public or private, which are contained within, flow through or border upon this state or any portion thereof, not regulated pursuant to sections 22a-28 to 22a-35



Source: Northeast Region Certified Crop Adviser Study Guide

Cornell University

https://nrcca.cals.cornell.edu/soil/CA3/

Principal Definitions (C.G.S. § 22a-38)

”Regulated Activity”

Any operation within or use of a wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses, but shall not include the specified activities in section 22a-40

Scope of Regulatory Authority

- Upland Review Areas (a.k.a. “buffer areas”)
  - Purpose is to protect wetlands and watercourses, not the upland review areas themselves
  - Agency may consider impacts on species outside wetlands and watercourses if those impacts will cause harm to the wetlands or watercourses: *River Sound Devel. LLC v. IW&WC*, 122 Conn. App. 644 (2010).
  - Best practice – specificity of regulations in identifying the extent of the upland review areas and the activities to be regulated within them. Compare *Prestige Builders, LLC v. IWC*, 79 Conn. App. 710 (2003), with *Three Levels Corp. v. Conservation Comm’n*, 148 Conn. App. 91 (2014)
  - Supreme Court authorized outright prohibition of certain uses by 3-2 vote; *Lizotte v. Conservation Commission*, 216 Conn. 320 (1990). Uncertain whether Court would reach same conclusion today, since many subsequent cases overturned permit denials based on lack of concrete evidence of harm. E.g., *River Bend Assoc. v. Conserv’n & Inland Wetlands Comm’n*, 269 Conn. 57 (2004)

Exemptions - CGS § 22a-40

***"As of right" uses under CGS** § 22a-40(a)*

- **Agricultural uses – the broadest exemption**
- **"Grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less essential to the farming operation, and activities conducted by, or under the authority of, the [DEEP] for the purposes of wetland or watercourse restoration or enhancement or mosquito control. The provisions of this subdivision shall not be construed to include road construction or the erection of buildings not directly related to the farming operation, relocation of watercourses with continual flow, filling or reclamation of wetlands or watercourses with continual flow, clear cutting of timber except for the expansion of agricultural crop land, the mining of top soil, peat, sand, gravel or similar material from wetlands or watercourses for the purposes of sale."**

Exemptions - CGS § 22a-40

Significant agricultural exemption cases

- **"[R]oad construction directly related to farming operations is permitted as of right under the Inland Wetlands and Watercourses Act;" *Indian Spring Land Co. v. Inland Wetlands & Watercourses Agency*, 322 Conn. 1, 4 (Conn. 2016). But the construction cannot involve "filling or reclamation of wetlands or watercourses with continual flow." 322 Conn. at 860-61, citing *Taylor v. Conservation Commission*, 302 Conn. 60 (2011).**
- **"[T]he "with continual flow" language of § 22a-40 (a) [applies] only to watercourses and not to wetlands." *Red 11, LLC v. Conservation Commission*, 117 Conn. App. 630, 646-47 (Conn. App. Ct. 2009)**

Exemptions - CGS § 22a-40

***Other "as of right" exemptions under** § 22a-40(a)*

- **Homes for which building permits were issued before 7-1-87 (this exemption is effectively extinct)**
- **Boat anchorage or mooring**
- **Residential accessory uses**
- **Certain water company activities**
- **Removal of debris from pre-regulation/pre-1974 drainage pipes on residential property lacking hydrophytic vegetation**
- **Withdrawal of water for fire emergencies**

Exemptions - CGS § 22a-40

***"Nonregulated use" exemptions under** § 22a-40(b)*

(1) Conservation of soil, vegetation, water, fish, shellfish and wildlife;

(2) Outdoor recreation including play and sporting areas, golf courses, field trials, nature study, hiking, horseback riding, swimming, skin diving, camping, boating, water skiing, trapping, hunting, fishing and shellfishing where otherwise legally permitted and regulated; and

(3) The installation of a dry hydrant by or under the authority of a municipal fire department, provided such dry hydrant is only used for firefighting purposes and there is no alternative access to a public water supply.

(4) Certain state agency activities (such activities arenot subject to municipal regulation anyway)

But such uses must not "disturb the natural and indigenous character of the wetland or watercourse by removal or deposition of material, alteration or obstruction of water flow or pollution of the wetland or watercourse."

Exemptions - CGS § 22a-40

Exemptions are not "self administered" – landowners can be required to "exhaust administrative remedies" by filing an application with the IWWA

Town of Canterbury v. Deojay, 114 Conn. App. 695 (2009)

Wilkinson v. Inland Wetlands & Watercourses Commission, 24 Conn. App. 163 (1991)

Cannata v. Dept. of Environmental Protection, 215 Conn. 616, 623, 577 A.2d 1017 (1990)

Procedural Highlights

- Hearings:
- For regulated activities, default provision is no hearing should be held unless agency (1) "determines" that proposed use may have significant impact; (2) receives petition filed by at least 25 resident adults no more than 14 days after "date of receipt;" or (3) "finds" that a hearing would be "in the public interest"
- No case yet on whether holding a hearing in the absence of an express "determination" or "finding" is a valid basis for an appeal. Seems very unlikely – what harm can be claimed?

Procedural Highlights

- Notices:

- Hearing and decision notices must be published in accordance with Conn. Gen. Stat. § 8-7d. Notices of certain applications must be sent to clerks of abutting municipalities in accordance with same statute. Legislature is currently considering allowing website notice in lieu of newspaper notice.
- Copies of proposed regulatory or boundary amendments must be filed with municipal clerk at least ten days before hearing (jurisdictional), and proposed amendments must be filed with DEEP at least 35 days before hearing (probably non-jurisdictional).
- Applications for uses in water company watersheds: applicant must give notice to water company within 7 days of date of application if water company filed watershed map in land records and with agency
- If regulatory or boundary amendments are approved, a copy must be filed with municipal clerk before effective date (jurisdictional) and with DEEP within 10 days after adoption (non-jurisdictional).

Procedural Highlights

Miscellany

- Agency may be asked to review a subdivision application for property having wetlands or watercourses even if no regulated activity would be involved. A “report” should be provided to the planning commission even though the agency is not deciding on an IWWA permit application.
- Applications need not comply with changes to regulations made after submission but may be required to comply with changes in state law. C.G.S. § 22a-42a(b).
- Inland wetlands and watercourses agencies may establish a fee sufficient to cover the reasonable cost of reviewing and acting on an application or petition, including, but not limited to, the costs of certified mailings, publication of notices and decisions, and monitoring compliance with permit conditions or agency orders. C.G.S. § 22a-42a(e).

Factors to consider for proposed regulated activities

- CGS § 22a-41

- (1) The **environmental impact** of the proposed regulated activity **on wetlands or watercourses**;
- (2) The **applicant's purpose** for, and **any feasible and prudent alternatives to**, the proposed regulated activity **which alternatives would cause less or no environmental impact to wetlands or watercourses;**
- (3) The relationship between the short-term and long-term impacts of the proposed regulated activity on wetlands or watercourses and the maintenance and enhancement of long-term productivity of such wetlands or watercourses;
- (4) **Irreversible and irretrievable loss** of wetland or watercourse resources which would be caused by the proposed regulated activity, including the extent to which such activity would foreclose a future ability to protect, enhance or restore such resources, and any **mitigation measures** which may be considered as a condition of issuing a permit for such activity including, but not limited to, measures to (A) prevent or minimize pollution or other environmental damage, (B) maintain or enhance existing environmental quality, or (C) **in the following order of priority: Restore, enhance and create productive wetland or watercourse resources;**
- (5) The character and degree of injury to, or interference with, safety, health **or the reasonable use of property** which is caused or threatened by the proposed regulated activity; and
- (6) Impacts of the proposed regulated activity **on wetlands or watercourses outside the area for which the activity is proposed** and future activities associated with, or reasonably related to, the proposed regulated activity **which are made inevitable** by the proposed regulated activity **and which may have an impact** on wetlands or watercourses

Factors to consider for proposed regulated activities

- Feasible and prudent alternatives
- "Feasible" means able to be constructed or implemented consistent with sound engineering principles
- "Prudent" means economically and otherwise reasonable in light of the social benefits to be derived from the proposed regulated activity provided cost may be considered in deciding what is prudent and further provided a mere showing of expense will not necessarily mean an alternative is imprudent
- If agency held a hearing after finding that the proposed activity might cause a significant adverse impact on wetlands or watercourses, it MAY NOT issue a permit unless it finds that a feasible and prudent alternative does not exist.

Factors to consider for proposed regulated activities

- Feasible and prudent alternatives

- If an agency calls a public hearing only because of the submission of a petition by 25 or more persons, or only because it believed such a hearing would be in the public interest, and **not** because it feared a "significant impact" on wetlands or watercourses, the agency is not required to apply the "feasible and prudent alternative" test. *Purnell v. Inland Wetlands & Watercourses Commission*, 209 Conn. App. 688, cert. denied, 343 Conn. 908 (2022).
- If permit is denied on the basis of a finding that there may be feasible and prudent alternatives to the proposed regulated activity which have less adverse impact on wetlands or watercourses, the agency must propose on the record in writing the types of alternatives which the applicant may investigate. The burden remains on the applicant to prove that such alternatives DO NOT exist. *Starble v. IWC*, 183 Conn. App. 280 (2018).

Factors to consider for proposed regulated activities

- Applying the standards

- Applications may not be denied because of generic "risks." The nature of the risk and the probability of harm must be reasonably supported by adequate (usually expert) evidence in the record. *River Bend Assoc. v. Conservation & Inland Wetlands Comm'n*, 269 Conn. 57 (2004); *Lord Family of Windsor, LLC v. IW&WC*, 103 Conn. App. 354 (2007), aff'd, 288 Conn. 669 (2008).
- Nevertheless, the applicant has the initial burden of supplying evidence that the proposed activities satisfy the regulatory criteria. *Finley v. IWC*, 289 Conn. 12 (2008).
- Great case for comparing these two ideas: *Three Levels Corp. v. Conservation Comm'n*, 148 Conn. App. 91 (2014). Court holds that commission's first reason for denial – risk of harm – was not adequately supported by the evidence, but that its second reason – failure of applicant to supply required information – was valid.
- Agency may not disregard expert testimony in absence of countervailing testimony. *Lord Family of Windsor, LLC v. IW&WC*, 103 Conn. App. 354 (2007), aff'd, 288 Conn. 669 (2008); *Feinson v. Conservation Comm'n*, 180 Conn. 421 (1980).

Conditions of Approval

Conn. Gen. Stat. § 22a-42a (d)

- Broad authority
- "May include any reasonable measures which would mitigate the impacts of the regulated activity and which would (A) prevent or minimize pollution or other environmental damage, (B) maintain or enhance existing environmental quality, or (C) in the following order of priority: Restore, enhance and create productive wetland or watercourse resources."
- "May include restrictions as to the time of year in which a regulated activity may be conducted, provided the inland wetlands agency, or its agent, determines that such restrictions are necessary to carry out the policy" of the IWWA

Conditions of Approval

- May not allow applicant to provide after-the-fact evidence that is necessary to prove compliance with applicable criteria in the first place. *Finley v. IWC*, 289 Conn. 12 (2008)

- May not be made personal to the applicant – permits must run with the land. *Fromer v. Two Hundred Post Assoc.*, 32 Conn. App. 799 (1993)

- May include bonding requirements to assure proper restoration. *Town of Canterbury v. Deojay*, 114 Conn. App. 695 (2009)

- May be subsequently removed or modified if proper evidence for doing so is provided. *Lorenz v. IW&WC*, 124 Conn. App. 489 (2010).

- Off-site mitigation may be acceptable, at least where applicant agrees. *Red Hill Coalition, Inc. v. Conservation Comm'n*, 212 Conn. 710 (1989).

Duration of Permits

- **C.G.S. § 22a-42a(d)(2)** provides:

- (A) Any permit issued under this section for the development of property for which an approval is required under chapter 124, 124b, 126 or 126a shall (i) not take effect until each such approval, as applicable, granted under such chapter has taken effect, and (ii) be valid until the approval granted under such chapter expires or for ten years, whichever is earlier.
- (B) Any permit issued under this section for any activity for which an approval is not required under chapter 124, 124b, 126 or 126a shall be valid for not less than two years and not more than five years. Any such permit shall be renewed upon request of the permit holder unless the agency finds that there has been a substantial change in circumstances which requires a new permit application or an enforcement action has been undertaken with regard to the regulated activity for which the permit was issued, provided no permit may be valid for more than ten years.

Duration of Permits

- **C.G.S. § 22a-42a(g)**, as amended in 2021, provides:
- (1) Notwithstanding the provisions of subdivision (2) of subsection (d) of this section, any permit issued under this section prior to July 1, 2011, that has not expired prior to July 12, 2021, shall expire not less than fourteen years after the date of such approval. Any such permit shall be renewed upon request of the permit holder unless the agency finds that there has been a substantial change in circumstances that requires a new permit application or an enforcement action has been undertaken with regard to the regulated activity for which the permit was issued, provided no such permit shall be valid for more than nineteen years.
- (2) Notwithstanding the provisions of subdivision (2) of subsection (d) of this section, any permit issued under this section on or after July 1, 2011, but prior to June 10, 2021, that did not expire prior to March 10, 2020, shall expire not less than fourteen years after the date of such approval. Any such permit shall be renewed upon request of the permit holder unless the agency finds that there has been a substantial change in circumstances that requires a new permit application or an enforcement action has been undertaken with regard to the regulated activity for which the permit was issued, provided no such permit shall be valid for more than nineteen years.

Enforcement

- Enforcement orders by the IWEO (C.G.S. § 22a-44):
  - Certified mail required
  - Hearing must be held within 10 days
  - Decision to maintain, revise or withdraw order must be sent by certified mail within 10 days after hearing
- Fines (C.G.S. § 22a-42g):
  - Must be established by ordinance (legislative body of municipality, not the IWWA)
  - May be up to $1,000 – not clear whether that may be "per day" (statute doesn't say so – compare C.G.S. § 8-12a)
  - Cumbersome hearing procedure under C.G.S. § 7-152c
- Court proceedings (C.G.S. § 22a-44):
  - Injunctive or declaratory relief available
  - Civil penalties up to $1,000/day are expressly available. Fines up to $1,000/day or prison term of up to 6 months may be ordered. Double for subsequent offenses.

Enforcement

- Enforcement actions by the IWWA (C.G.S. § 22a-42a(d)):
  - IWWA "may suspend or revoke a permit if it finds after giving notice to the permittee of the facts or conduct which warrant the intended action and after a hearing at which the permittee is given an opportunity to show compliance with the requirements for retention of the permit, that the applicant has not complied with the conditions or limitations set forth in the permit or has exceeded the scope of the work as set forth in the application."
  - Applicant must be notified of the agency's decision by certified mail within fifteen days of the date of the decision.
  - Notice of any order to issue, deny, revoke or suspend a permit must be published within 15 days in a newspaper having a general circulation in the town wherein the wetland or watercourse lies. If IWWA fails to publish notice, permittee may do so within the next ten days.

Appeals

Appeals of decisions for which notices must be published are available under C.G.S. § 22a-44 but must be commenced within 15 days after publication of notice of decision

Court may “modify” a decision if it finds that a “taking” would otherwise result

Unclear whether an appeal may be taken from an IWWA decision on an enforcement order because publication is not required. *Town of Canterbury v. Deojay*, 114 Conn. App. 695 (2009).