



# THE HABITAT

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Editor: Tom Odell

## Who Pays the Piper . . . Funding Professional Reviews in Wetlands Applications *by Mark K. Branse, Esq., Branse & Willis, LLC*

*Editor's Note:* CACIWC has received numerous requests for information on the how commissions can legally contract with a "third party" technical expert to review development applications at the expense of the applicant. In this issue there are two articles with information to assist commissions in making a decision regarding "expert witnesses." Both articles, "Who Pays the Piper . . . Funding Professional Reviews in Wetlands Applications," by Mark K. Branse, Esq. (see below) and "Errors as a matter of fact: trouble with experts," in "Connecticut's Inland Wetlands and Watercourses: Permit Denials" presented by the Connecticut Attorney General's Office (page 8) are by attorneys who work closely with municipal inland wetlands commissions.

Land use reviews have become more complex and the risks of making a mistake have increased. In Glasson v. Portland, 6 Conn. App. 229 (1985), the Appellate Court found the town liable for drainage impacts on a downstream owner resulting from an upstream subdivision that the town had approved. Issues of stormwater management, habitat impact, and erosion control arise in almost every wetland application, but specialized technical expertise is needed to perform a competent review to guide the wetlands agency in its decision making. Town budgets have been strained for years and funding to adequately staff local land use agencies is harder to come by than ever. What to do?

The General Statutes provide two responses to this problem. First, Conn. Gen. Stats. § 22a-42a(d)(2) provides, in relevant part:

The inland wetlands agency may require a filing fee to be deposited with the agency. The amount of such fee shall be sufficient to cover the reasonable cost of reviewing and acting on applications and petitions, including, but not limited to, the costs of certified mailings, publications of notices and decisions and monitoring compliance with permit conditions or agency orders.

Although the language doesn't actually say this, most towns have construed this to mean that a fee schedule should be adopted by the agency as part of its Inland Wetlands and Watercourses Regulations, often as an appendix or schedule. By using the same procedures as for any other amendment to the regulations, procedural due process questions are avoided.

A second funding source is in Conn. Gen. Stats. §8-1c, which allows a municipality to adopt an ordinance setting the application fees for all land use agencies, which schedule shall supersede those set by the land use agencies themselves. In selectman towns, this means that approval is required by the Town Meeting. The authority to adopt application fees which cover all costs of review, including post-approval monitoring of compliance, has been upheld in the case of Pollio v. Planning Commission of Somers, 232 Conn. 44 (1995).

Under either Section 22a-42a(d)(2) or Section 8-1c, the agency can include all costs, not just those for outside consultants. Each land use agency can and should determine, as accurately as possible: the percent of staff time (including clerical and stenographic services) used by that agency and the salary and benefits of those staff; costs for paper and other hard supplies; their proportional share of the costs of office space (heat, lights, etc.) at the municipal office building; legal advertisements and notices; the history of appeals and a factor to allow for transcription and legal fees for a foreseeable risk of such appeals in the future. These "in house" costs should constitute the "base line" for application fees. As long as the calculation of costs is based on a reasonable estimate and the best available information, a court will probably uphold it.

Another element of some fee schedules is a penalty for applications that are incomplete or shoddy. These schedules allow a certain number of reviews, or a certain number of hours of review time, to be covered under the "base fee." If review time exceeds that fixed amount, then

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**We Welcome A New Board  
Member**

The CACIWC Board of Directors is pleased to announce the recent appointment of **Tim Bobroske** of **Harwinton** to the Board of Directors. Tim is secretary / vice-chair of the Harwinton Inland Wetlands and Watercourses Commission. He will serve on the Board as the Litchfield County Representative. Tim comes to us with high commendation from his commission for his energy, willingness to learn, and experience in the construction industry. We look forward to working with him!

**Dues Are Due!**

Membership forms for the 2004-2005 fiscal year were sent to each commission in July. If you have not submitted your renewal, please do as soon as possible so that we may have updated information from your commission. Your membership ensures that your commission will receive a copy of *The Habitat* for each commissioner. If another membership form is needed, contact Tom ODell, 860.399.1807, or visit [caciwc.org](http://caciwc.org), click on "About CACIWC...."

*The Habitat* is the newsletter of the Connecticut Association of Conservation and Inland Wetlands Commissions (CACIWC). Materials from *The Habitat* may be reprinted with credit given. The content of *The Habitat* is solely the responsibility of CACIWC and is not influenced by sponsors or advertisers.

*The Habitat* welcomes articles and items, but will not be responsible for loss or damage. Correspondence to the editor, manuscripts, inquiries, etc. should be addressed to *The Habitat*, c/o Tom ODell, 9 Cherry St., Westbrook, CT 06498. Phone & fax (860)399-1807, or e-mail [todell@snet.net](mailto:todell@snet.net).

*Piper, continued from page 1*

additional fees become payable for the extra hours or reviews.

For outside consultants, there are two methods of calculating fees: One is to determine which consultants will be needed for each application and then ask each such consultant to estimate his/her fees for review. Towns that use this method usually apply a 150% contingency factor to the estimate and require the applicant to file the estimated fees up front. If the fees are lower than estimated, the applicant receives a refund and if they are higher, the municipality must pay the difference. A second method is to estimate these kinds of consulting costs for the "typical" application on a per lot, or per linear foot of road, or per acre of wetlands or other numeric basis; or some combination thereof. This factor is then added to the "base line" fee.

The first method tends to be more responsive to the uniqueness of each application, but it requires more bookkeeping by the municipality. Each application fee balance must be separately accounted for and each bill must be correctly paid from the proper account. It's a lot of paperwork. The second method is simpler to operate because the fees are calculated based on a formula, with no need for prior fee estimates or separate accounts for each application.

However, a controversial or difficult application may end up paying much less than its actual review costs.

Regardless of the method used, the municipality must be in a position to collect the fee. The local regulation must include a provision that the fee is to be paid before the agency votes on the application and that failure to pay the fee will be grounds for denial of the application without prejudice. Making the fee payment a condition of approval is risky because the application may be *denied*, in which case the applicant has no incentive to pay the fee at all.

Lastly, the agency should consider a provision that allows the application fee to be waived. Some agencies are willing to waive fees for municipal applications or non-profit sponsors, while others are not. Just remember that you must be consistent in applying whatever rule you adopt.

The money you need to review applications properly is there for the asking. When I represent developers, I actually prefer to have adequate professionals working with the agency because it keeps the discussion on a factual and scientific level, rather than on gut reaction, fear, and conjecture. So look at your review process and see if it's meeting your current needs. If it's not, look at your costs and explore recovering them through a new application fee calculation. 🍁

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## ANNOUNCEMENTS

### Nominations for Official Greenway Designations

The Connecticut Greenways Council is soliciting nominations for this year's official state greenway designation. Designated greenways, both for recreation and resource protection, will be listed in a subsequent revision of the State Plan of Conservation and Development and may receive increased consideration for a variety of grants. The Greenways Council will evaluate all nominated greenways for consistency with designation criteria. Those selected for designation will be announced by the Council in the Spring of 2005. **Deadlines for nominations will be March 1, 2005.** The announcement and designation criteria can be downloaded from CACIWC.ORG. For more information, please contact Leslie Lewis at the Department of Environmental Protection, (860) 424-3578 or email at [leslie.lewis@po.state.ct.us](mailto:leslie.lewis@po.state.ct.us).

### P & Z Seminar: Save the Date

The Planning and Zoning Section of the Connecticut Bar Association will be holding its all-day seminar for commission members and staff on March 5, 2005, at Wesleyan University, Middletown Connecticut. Registration will be at 8:30 a.m. and adjournment around 4 p.m. We have kept the admission fee to the subsidized rate of \$35.00 per person, which includes both a box lunch and the printed materials. Even those who have attended this seminar before should attend again because the law has changed in many significant ways in the past two years.

The Bar Association will be sending out announcements to the Towns, but we find that they often arrive too late for Commissions that may only meet once a month or so.



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# Wetland Mitigation: Panacea or Problem...

by Marguerite W. Purnell

**Editor's Note:** Conservation Commissions and Inland Wetland Commissions should be aware of the issues with wetland land mitigation when the proposed mitigation is wetland restoration and creation. Conservation Commissions, as a research and advisory board, can assist the Inland Wetlands Commission by providing recommendations based on research of case studies of wetland restoration and creation. The following article provides an excellent review and sources for further information.

During the last 15 years, the fields of wetland restoration and creation have grown significantly, spurred by the adoption of a "no-net-loss" policy that was developed in the late 1980's in an effort to stem the massive loss (over 50 %) of wetlands in the lower 48 States. Connecticut exceeds the national average, having lost 74% of its wetlands from the 1780's to the 1980's (NRC, 1992). Currently, in Connecticut when a resource is to be irreversibly and irretrievably impacted, mitigation may be considered "...in the following order of priority: restore, enhance and create productive wetland or watercourse resources;" (CGS Section 22a-41a (4)).

While the concepts of "no net loss" and wetland mitigation might appear to provide a workable solution to the problem

of our ever dwindling wetland resources, closer scrutiny reveals some very disturbing trends:

◆ An early study in Florida found that "out of more than 100 permitted projects requiring wetland mitigation only 40 had undertaken any mitigation activity" and that "only four of the 40 projects studied met all of the stated goals established in the permit."(Erwin, 1991).

◆ In 2001 the National Research Council published an extensive review of compensatory mitigation and concluded: "The goal of no net loss of wetlands is not being met for wetland functions by the mitigation program..." (NRC, 2001).

◆ A New Jersey analysis of created wetlands concluded that "the evaluation of 90 select freshwater mitigation sites around the State...indicates that between 1988 and 1999 wetland mitigation practices have not been effective in meeting NJDEP's...goal for increasing wetland quantity and quality in New Jersey. Less than one out of every two acres of proposed mitigation resulted in achieving a fresh-

*Mitigation, continued on page 10*

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# Assessing the Impacts: Evaluating the Potential Physical Changes to Wetlands and Watercourses from Upland Development

## Checklist of Potential Impacts to Wetlands and Watercourses

Evaluate Location and Extent of:

### ***Landscape Changes***

- Cuts/fills
- Changes in size of watershed/recharge area
- Berms, swales, slope changes
- Manipulation of slopes adjacent to wetlands and watercourses
- Roadside ditches
- Changes in frequency and duration of flooding
- Changes in frequency and duration of runoff

### ***Landuse/Landcover Changes***

- Changes in % impervious area
- Vegetation removal in riparian areas, floodplains, adjacent to wetlands
- Lawns up to edge of wetlands and watercourses
- Invasive plants allowed
- Percent of watershed/recharge area already developed

### ***Infrastructure***

- Road layout
- Curbs; connected to storm drains or runoffs
- Storm drains and outlets
- Retaining walls
- Curtain and perimeter drains and outlets
- Culverts and/or bridges
- Municipal water and/or sewer

### ***E&S and Stormwater Management***

- Sediment basins
- Detention basins
- Stormwater quality and quantity BMP's
- Cleanouts and maintenance needs

***Editor's Note:*** The above checklist was distributed at CACIWC's 2004 Annual Meeting and Environmental Conference November 13, 2004 as part of the workshop, "Assessing the Impacts: Evaluating the Potential Physical Changes to Wetlands and Watercourses from Upland Development", presented by Dr. Glenn Warner, Associate Professor, University of Connecticut, and Kipen J. Kolesinskas, State Soil Scientist, USDA-Natural Resources Conservation Service. Their Powerpoint presentation is available on CACIWC.org, or you can request a copy by email to Tom ODell, [todell@snet.net](mailto:todell@snet.net). 

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# Connecticut's Inland Wetlands and Watercourses: Permit Denials

## *Outline of Presentation by The Attorney General's Office*

**Overtaken decisions of wetlands commissions have generally fallen into three categories:**

### **A. Errors as a matter of fact: trouble with experts**

#### 1. Experts: do you need any?

a. Lay commissioners may rely on their personal knowledge concerning matters "readily within their competence:" such as flood levels observed during storm of record.

b. Commissioners with expertise may be relied on by the commission IF the commissioner's expertise has been disclosed and the applicant is given a chance to rebut the expert opinion.

c. A lay commission acts without substantial evidence and arbitrarily when it relies on its own knowledge and experience concerning technically complex issues such as pollution control, in disregard of contrary expert testimony.

d. Credibility of witnesses is a matter within the province of the commission, BUT a commission cannot disregard the only expert evidence on the issue when agency members lack their own expertise or knowledge.

e. The lack of a witness in support of the commission's decision is a primary reason for denials being reversed on appeal.

f. Some agencies will require expert testimony for every application because the municipal regulations require consideration of complex pollution issues for each application.

#### 2. Lack of resources to finance experts

a. If your town does not provide a budget sufficient to cover the costs of hiring experts to advise you in the processing of applications or the monitoring of compliance with permits, rely on the statutory provision to assess fees sufficient to carry out your legal duties.

b. "The inland wetlands agency may require a filing fee to be deposited with the agency. The amount of such fee shall be sufficient to cover the reasonable cost of reviewing and acting on applications and petitions, including, but not limited to, the costs of certified mailings, publications of notices and decisions and monitoring compliance with permit conditions or agency orders." § 22a-42a(e) of the General Statutes.

c. Adopt a regulation that establishes a fee schedule sufficient to fund your duties. Follow the mandatory procedure for adopting regulations in § 22a-42a(b). Amend the fee schedule as needed for budgetary shortfall from your town.

#### 3. When you have an expert:

a. Testimony about "potential" or "risk" is insufficient for denial.

b. The higher the certainty of probability of the opinion the more likely your commission decision will be upheld.

### **B. Errors as a matter of procedure**

#### 1. Personal or financial interest of agency member:

a. "No member or alternate member . . . shall participate in the hearing or decision of such . . . commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense. In the event of such disqualification, such fact shall be entered on the records of such . . . commission." § 22a-42(c). "Personal" can include membership in an organization that is the applicant or affected party. "Indirect" can include family members.

*Denials, continued on page 9*

*Denials, continued from page 8*

- b. The decision to disqualify a member must arise from the member; the chair or others can not order the disqualification of a member.
- c. The appearance of a conflict is sufficient to disqualify a member.

2. Fundamental fairness

a. “The only requirement in administrative proceedings is that the conduct of the hearing shall not violate the fundamentals of natural justice.”

b. This includes:

- 1. notice of meeting;
- 2. no one with the burden to prove something denied the right to produce relevant evidence or cross-examine witnesses of the opponent;
- 3. right to offer rebuttal evidence;
- 4. no ex parte consideration of evidence (all evidence must be presented at public meeting available for public to examine);
- 5. agency members shall be unbiased: “bias can take the form of favoritism toward one party of hostility toward the opposing party; it is a personal bias or prejudice which imperils the open-mindedness and sense of fairness.” “The law doesn’t require members of . . . commissions to hold no opinion.” The issue is whether a member has made up his/her mind before the meeting, regardless of any arguments that would be advanced.

**C. Errors as a matter of law**

Environmental issues in general: Inland wetlands agencies are not “mini-EPAs”; there are valid environmental matters that are beyond the reach of the wetlands act to regulate.

Other societal issues are outside your jurisdiction.

Groundwater, in and of itself, is not regulated under the wetlands act.

Groundwater impacts that then impact wetlands or watercourses come within the act, if the agency properly establishes the nexus between those resources.

Acting outside the authority of the wetlands act: Your authority and duties are established by the wetlands act. Agencies may not create new authority, such as establishing an insurance fund for property owners whose drinking water wells are contaminated by applicant whose permit was granted.

Exemptions: Agencies must allow activities that fall within the statutory exemptions even though the activities have an adverse effect on wetlands and watercourses.

Exemptions: Agencies are not authorized to change the exemption, making them harder for applicants to meet.

Definition of regulated activity: if agency’s definition doesn’t include any activity which impacts are likely to have adverse impact on wetlands or a watercourse, the agency cannot regulate impact outside of upland review area.

*Note: This article was a handout from one of the two workshops presented at CACIWC’s 2004 Annual Meeting and Environmental Conference, November 13, 2004, by The Attorney General’s Office. 🍁*

*Mitigation, continued from page 5*

water wetland” (NJDEP, 2002). In fact, an overall net loss of 22% of wetland acreage was documented and led to the statement by NJ DEP’s Commissioner “The most important lesson we must learn from these results is that mitigation is not a substitute for avoiding and minimizing wetlands fill wherever possible.”

◆ In Pennsylvania a study found that the soils and vegetation are significantly different in created versus natural wetlands and thereby concurred with other recent findings “that created wetlands do not look, or function, like the natural systems they are intended to replace” (Campbell, Cole and Brooks, 2002).

◆ In a study of 60 mitigation sites throughout New England, “only ten (17%) were considered to be adequate functional replacements for the impacted wetlands” though “forty (67%) “were determined to meet permit conditions and would be considered successful by that standard.” (Minkin and Ladd, 2003).

These are but a handful of the ever burgeoning scientific literature that continues to document an ongoing decline of wetland acreage and, perhaps more importantly, function. Professionals in the field agree that a complete understanding of the complexity of natural wetland systems is still beyond our reach, and that to date, wetland creation as a mitigation tool has met with dubious success.

**Websites of Interest**

Association of State Wetland Managers  
www.aswm.org  
Environmental Law Institute  
www.eli.org  
National Wildlife Federation  
www.nwf.org  
Society for Ecological Restoration  
www.ser.org  
Society of Wetland Scientists  
www.sws.org  
US EPA  
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**References / Further Reading**

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*Marguerite W. Purnell is a conservation biologist with special interest in the fields of restoration ecology and bioengineering. She is an Inland Wetland Commission member in the Town of Washington and is on CACIWC’s Board of Directors.* 🍁

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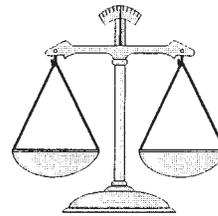


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U.S. Patent No. 5,087,151, U.S. Patent No. 5,419,836, U.S. Patent No. 6,129,482 U.S. Patent No. 6,322,288 B1. Other U.S. and Foreign patents. Other U.S. patents pending. RECHARGER®, CONTACTOR®, HVLV™ and STORMFILTER® are trade names of CULTEC, Inc. Copyright © 2004 CULTEC, Inc. All rights reserved.

# CACIWC'S 27<sup>TH</sup> Annual Meeting & Conference: Another Great Success!

Again this year, some 250 Connecticut conservation and inland wetlands commissioners took time out of their busy lives to learn, listen and network at our 27<sup>th</sup> Annual Meeting, held November 13<sup>th</sup> at the Mountain-side in Wallingford. We thank YOU who attended for your willingness to educate yourself, and for the work you do for your community.

**Professor David Wagner,** Associate Professor of Ecology and Evolutionary Biology at UConn gave an interesting talk, *Bioblitzing:*

*Exploring Connecticut's Natural Heritage.* Dr. Wagner discussed entomological discoveries made during the four Connecticut bioblitzes sponsored by the Connecticut State Museum's of Natural History.

Dr. Wagner was recently elected to the Board of the Connecticut Chapter of The Nature Conservancy and is currently Vice-chair of the National Park Service's "All Taxa Biodiversity" survey in Great Smoky Mountains National Park.

The key event of the day was the educational program: **twelve excellent, well-received workshop presentations** were given by specialists and technologists in their



*Wendy Goodfriend gives guidance on how to read and evaluate site development plans.*

evaluation forms told us how much you liked the workshops and displays. We agree, they were THE best.

respective fields. **Twenty-eight displays** provided additional and interesting materials for commissioners. Your

Lastly, we thank the staff at Mountainside for the great accommodations and wonderful food. Bottom line: a great day was had by all! See you at our 2005 meeting!

AND MORE APPLAUSE TO THE AWARD RECIPIENTS!

**Laurene K. McEntire** of the Cromwell Conservation Commission received the award for **Conservation Commissioner of the Year** for her work on evaluating and preserving open space areas in Cromwell.

**Dave Schreiber** of the Oxford Conservation & Inland Wetlands Commission received the award for **Inland Wetlands Commissioner of the Year**. He also received a **Lifetime Achievement Award**. Dave lead his commission for 30 years! These years were marked with fair and balanced leadership that won him the respect of applicants and commissioners alike.

The **Woodstock Conservation Commission** was selected as the **Conservation Commission of the Year**. Members were recognized for their comprehensive approach to the development of a town-wide natural and cultural resource inventory, open space assessment and long-term planning tool. This effort led to the development of *A Plan of Open Space and Development*



(APOSC) which was approved by the town in 2001. *Assistant Attorney General Janet Brooks discusses inland wetlands legal issues at one of twelve workshops presented during the conference.*

The **Middletown Inland Wetlands and Watercourse Agency** was selected as **Inland Wetlands Commission of the Year**. It was recognized for its consistency and objectivity in determining the impact of proposed applications on the long-term preservation of town wetlands. The impact of its objective approach was seen in the approval of a municipal application for siting a new high school that was revised to avoid destruction of an important wetland system. 🍁



**Connecticut Association of Conservation  
and Inland Wetlands Commissions, Inc.**  
P.O. Box 2373      Vernon, CT 06066-1773  
860 896-4731 · 860 399-1807 · [www.caciwc.org](http://www.caciwc.org)

CACIWC has received a grant to develop a plan for an inland wetlands service bureau. The service bureau would provide 'close to home' information and education assistance to Inland Wetlands Commissioners. To be effective, we need to know your needs. Please complete this survey (either individually or as an entire commission) and return it to the above address by January 31<sup>st</sup>. Thank you!

## INLAND WETLANDS SERVICE BUREAU SURVEY

1) Who is completing this survey? (Circle one)

*Commission Member*

*Entire Commission*

*Commission Staff*

2) Which county are you from? \_\_\_\_\_

3) Do you consider your town: (Circle one) Urban      Suburban      Rural

4) Which of the following would be most helpful to your commission?

(Please rank each of the following from 1 to 5, with 1 = very helpful and 5 = not helpful)

\_\_\_ Hands on training/workshops

\_\_\_ Enhanced CACIWC website

\_\_\_ Technical Symposia

\_\_\_ Video/CD/DVD

\_\_\_ Written Manuals/Guidelines

\_\_\_ Computer Interactive programs

\_\_\_ Information Clearinghouse

\_\_\_ Phone-in Service

\_\_\_ Individual Technical Assistance

\_\_\_ Legislative Updates

\_\_\_ Other (please specify) \_\_\_\_\_

5) Which of the following topics do you (or your commission) want to know more about?

(Please check all that apply; two check marks can be used if you feel strongly about a topic)

### GENERAL

\_\_\_ Contact information for specialists

\_\_\_ Networking opportunities

\_\_\_ Contact information for organizations

\_\_\_ Regional cooperation (watershed based)

\_\_\_ Other (please specify) \_\_\_\_\_

## TECHNICAL

- |   |   |
|---|---|
| <input type="checkbox"/> Construction Techniques              | <input type="checkbox"/> Plant Identification/Invasive plants |
| <input type="checkbox"/> Erosion & sedimentation controls     | <input type="checkbox"/> Point source pollution               |
| <input type="checkbox"/> Functions & values of wetlands       | <input type="checkbox"/> Reading site plans and maps          |
| <input type="checkbox"/> Geographic information systems (GIS) | <input type="checkbox"/> Soil identification                  |
| <input type="checkbox"/> Hydrology and hydraulics             | <input type="checkbox"/> Stormwater control / management      |
| <input type="checkbox"/> Mitigation                           | <input type="checkbox"/> Upland review areas                  |
| <input type="checkbox"/> Non-point source pollution           | <input type="checkbox"/> Vernal pools                         |
| <input type="checkbox"/> Physical impact assessment           | <input type="checkbox"/> Watershed analysis & prioritization  |
| <input type="checkbox"/> Other (please specify) _____         |   |

## LEGAL AND OPERATIONAL

- |   |  |
|---|--|
| <input type="checkbox"/> Building the record & criteria for decisions | <input type="checkbox"/> Meeting procedures                          |
| <input type="checkbox"/> Conservation easements /deed restrictions    | <input type="checkbox"/> Model regulations                           |
| <input type="checkbox"/> Crafting motions                             | <input type="checkbox"/> Ordinances(fine, fees for app. review, etc) |
| <input type="checkbox"/> Fee schedules                                | <input type="checkbox"/> Records retention law                       |
| <input type="checkbox"/> Freedom of Information law                   | <input type="checkbox"/> Site visits                                 |
| <input type="checkbox"/> Jurisdictional issues                        | <input type="checkbox"/> Wetlands statutes / regulations – general   |
| <input type="checkbox"/> Other (please specify) _____                 |  |

6) What are the thorniest issues your commission faces?

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7) Additional suggestions & comments: \_\_\_\_\_

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# 2004 Inland Wetlands Legislation & Regulations Advisory

*Editor's Note: URGENT! Please read Cautionary Note at the bottom of this advisory. The following was issued from Yvonne Bolton, Acting Bureau Chief, Bureau of Water Management, CT DEP, to Municipal Inland Wetlands Agencies, November 2004.*

The 2004 Legislature amended section 22a-41 of the Inland Wetlands and Watercourses Act (IWWA) with the passage of Public Act 04-209. The changes involve the consideration of aquatic, plant or animal life in the factors for consideration. Public Act 04-209 was signed by the Governor and went into effect on June 3, 2004.

To assist Municipal Inland Wetlands Agencies in amending their regulations, we are providing the Public Act language with the suggested revisions to the Inland Wetlands and Watercourses Model Regulations (IWWMR).

Inland Wetlands Agencies should plan to revise their regulations in the near future to conform to the new statute. The provisions of Public Act 04-209 govern until such time that your municipal regulations are amended.

Please note that new text has been underlined.

Public Act 04-209 – An Act Concerning Jurisdiction of Municipal Inland Wetlands Commissions

This Public Act has amended section 22a-41 of the IWWA with the addition of new subsections (c) and (d) to read as follows:

(c) For purposes of this section, (1) “wetlands or watercourses” includes aquatic, plant or animal life and habitats in wetlands or watercourses, and (2) “habitats” means areas or environments in which an organism or biological population normally lives or occurs.

(d) A municipal inland wetlands agency shall not deny or condition an application for a regulated activity in an area outside wetlands or watercourses on the basis of an impact or effect on aquatic, plant, or animal life unless such activity will likely impact or affect the physical characteristics of such wetlands or watercourses.

In order to conform to these revisions, the following changes to the IWWMR are made:

1. Section 10.5 of the IWWMR is deleted and replaced with the following:
  - 10.5 For purposes of this section, (1) “wetlands or watercourses” includes aquatic, plant or animal life and habitats in wetlands or watercourses, and (2) “habitats” means areas or environments in which an organism or biological population normally lives or occurs.
2. A new section 10.6 of the IWWMR is added to read as follows:
  - 6.6 A municipal inland wetlands agency shall not deny or condition an application for a regulated activity in an area outside wetlands or watercourses on the basis of an impact or effect on aquatic, plant, or animal life unless such activity will likely impact or affect the physical characteristics of such wetlands or watercourses.
3. A new section 10.7 of the IWWMR is added to read identical to the language of the prior section 10.5 of the IWWMR as follows:
  - 6.6 In reaching its decision on any application after a public hearing, the Agency shall base its decision on the record of that hearing. Documentary evidence or other material not in the hearing record shall not be considered by the Agency in its decision. A conclusion that a feasible and prudent alternative does not exist does not create a presumption that a permit should be issued. The applicant has the burden of demonstrating that his application is consistent with the purposes and policies of these regulations and sections 22a-36 to 22a-45, inclusive, of the Connecticut General Statutes.

## Cautionary Note

Public Act 04-209 does not amend the definition of “Wetlands” or “Watercourses” as noted in sections 22a-38(15) and 22a-38(16) of the IWWA. The inclusion of aquatic, plant or animal life and habitats in wetlands and watercourses is limited in application to section 22a-41 of the IWWA. Therefore, the DEP is only modifying section 10 of the IWWMR because such is the only section of the IWWMR relevant to the factors for consideration as noted in section 22a-41 of the IWWA. Municipal Inland Wetlands Agencies should not propose any amendments to the definitions of wetlands or watercourses as a result of Public Act 04-209.

Should you have any further questions regarding the above changes, please feel free to contact the Wetlands Management Section. You can call the Wetlands Management Section at (860) 424-3019 or write to us at: Department of Environmental Protection, Inland Water Resources Division, 79 Elm Street, Hartford, CT 06106-5127. 🍀



**Connecticut Association of Conservation  
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## HERE'S WHAT'S ON CACIWC'S HOLIDAY WISH LIST....

- \* Open space funding
- \* Farmland protection
- \* Increased funds for DEP
- \* Registration of ATVs
- \* Funding to support our plans for services to IW Commissions
- \* Increased protections for water quality

.....and the list goes on.....

We hope that YOUR holiday is filled with good times with family and friends. We thank each of you for the time you gave to your commission and your community in 2004 - and we wish you all a happy, healthy 2005. 🍁

Fall 2004

[www.caciwc.org](http://www.caciwc.org)

### THE HABITAT

*Dedicated to constant vigilance, judicious management and  
conservation of our precious natural resources.*



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