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In response to your requests, two advanced technical workshops are offered for experienced inland wetlands commissioners. See Workshops D.1 and D.3



An inaugural session specifically tailored for inland wetlands agents is also offered. See workshop D.2.

See pages 8 & 9 for these new advanced workshops plus our other great learning opportunities.


Karl J. Wagener, Executive Director of Connecticut Council on Environmental Quality to Address CACIWC's Annual Conference

Karl J. Wagener will be the keynote speaker at CACIWC's 31st Annual Meeting and Environmental Conference on Saturday, November 8, 2008 at MountainRidge in Wallingford.



It is the job of the Council on Environmental Quality (CEQ) to keep track of the state's environmental progress (or lack thereof). In his keynote address, "Is Connecticut Really Doing Enough to Conserve Land and Scenic Resources?", Karl Wagener will reveal the conclusions of the Council's recent review of Connecticut's inland wetlands program, along with some of the latest data on the conservation of farms, forests, wetlands and other lands. He will also discuss the Council's ongoing review of what the state is doing and not doing to protect its scenic resources, and what municipal commissions might do on their own.

Mr. Wagener has served as Executive Director of the Connecticut Council on Environmental Quality since 1985. The Council is a state agency -- separate from the Department of Environmental Protection -- that monitors trends and advises the Governor, General Assembly, and state agencies on environmental policy. It is perhaps best known for its annual comprehensive report, "Environmental Quality in Connecticut."

Prior to his appointment to the Council, Mr. Wagener was Director of the Connecticut Audubon Society's Environmental Center in Hartford. Karl lives in Glastonbury, where he served on the Conservation and Inland Wetlands Commission for ten years. He currently serves on the Board of the Kongscut Land Trust. 

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Establishing Greenways

by Laurie Giannotti, AICP, CT DEP Trails & Greenways Program Coordinator


Editor's Note: In 1995 Public Act No. 95-335, The Greenways Act, changed the Plan of Development of a municipality to the Plan of Conservation and Development, and enabled Conservation Commissions to propose Greenways for inclusion in the Plan. Conservation Commission legislation (Sec 10, Subsection (b) of Section 7-131a) was subsequently changed to include, "It may propose a greenway plan for inclusion in the Plan of Conservation and Development ..."

A 'Greenway' is defined within our CT General Statutes under Section 23-100 as a corridor of open space that:

- may protect natural resources, preserve scenic landscapes and historical resources or offer opportunities for recreation or nonmotorized transportation,
- may connect existing protected areas and provide access to the outdoors,
- may be located along a defining natural feature, such as a waterway, along a man-made corridor, including an unused right-of-way, traditional trail routes or historic barge canals or
- may be a greenspace along a highway or around a village.

The first step (and it may take a long time!) in establishing a greenway is to locate areas that work to achieve these goals for your town. This will involve conducting assessments at the local and regional levels to understand where existing open space and critical natural, scenic, historical and recreational resources occur, overlap and can be connected. Public education and participation in finalizing your greenway location(s) is critical to avoiding potential landowner conflicts and to establishing support for any greenway.

Once you have a greenway located it may make sense to have it included in your plan of conservation and development and open space plan and to inform all town land use boards. At this point, consider nominating your greenway(s) for official designation by the CT Greenways Council (visit www.ct.gov/dep, click "outdoor recreation", then "Greenways"). Officially Designated Greenways are included in our State Plan of Conservation and Development and in Statewide Trail and/or Greenway Plans, and may be given priority for a variety of grants.

Resources available to you for greenways planning assistance include: your municipal planner and/or planning commission; regional planning organizations, (<http://www.ct.gov/opm/cwp/view.asp?a=2986&q=383046>); CT Greenways Council members (visit website noted above); UConn Cooperative Extension's Center for Landuse Education and Research, (<http://clear.uconn.edu/>); and your local Conservation Districts, (<http://www.conservect.org/>). DEP administered grants programs that are available to you for greenways projects include: Open Space Grants-land acquisition; Greenways Small Grants Program-planning and outreach; National Recreational Trails Grants – design, construction or maintenance of trail. The DEP Greenways Small Grant Program provides up to \$5,000 for Planning, Designing and Implementing Greenways. For more information search the web for CT Greenway Grants. 

Co-occurring Resource Inventories in the Last Green Valley

by Michael Altshul, Holly Drinkuth and Steve Broderick, Green Valley Institute

Editor's Note: A Natural Resource Inventory (NRI) is utilized by Conservation Commissions as a means of "...conducting research into the utilization and possible utilization of land areas of the municipality..." — a statutory responsibility. Geographic Information System (GIS) maps provide commissions with "table-top" access to the location and relative importance of natural resources in their community. In the following article the authors explain how cutting-edge technology can be used to analyze and prioritize the importance of commission-based GIS-NRI assessments.

A Co-occurring Resource Inventory is a tool used in conservation planning to identify areas of overlapping – or co-occurring – natural and cultural resources. Conservation Commissions are able to identify resources such as active farmland, potential drinking water aquifers and riparian corridors and assign numerical value to those resources. The digital analysis highlights areas possessing multiple resources which may be considered priorities for conservation tools such as open space acquisition, land use regulations or sustainable design practices.

The Green Valley Institute (GVI) was formed through a formal partnership between the Quinebaug-Shetucket National Heritage Corridor (known as the Last Green Valley), the University of Connecticut Department of Cooperative Extension, University of Massachusetts Extension and The Nature Conservancy to help Heritage Corridor communities and citizens sustain their environment and quality of life while growing their economies. We are a non-regulatory organization dedicated to:

- Improving the knowledge base from which land use and natural resource decisions are made,
- Building local capacity to protect and manage natural resources as our region grows.

Our goal is to insure land use decision makers, including Conservation Commissions have the information, knowledge and resources they need to make good land use decisions as they plan for the future. Our vision is that one day, land use and natural resource-related decisions, at every level from the individual landowner to the Corridor as a whole, will be made by informed individuals who have up-to-date information and the resources to follow through.

The GVI provides geographic information systems support to Corridor communities through the development of Natural Resource Inventories, data management and analysis. To date we have assisted 17 towns with mapping projects, natural resource inventory development and most recently "Co-occurring Resource Inventory" analyses.

The Co-occurring Resource Inventory is a collaborative project between the Town Conservation Commission and the GVI. Inventories are developed using geographic information system (GIS) natural resource data from a variety of sources. With instruction and assistance from GVI and other partners, individual data sets are selected by the Commission and assigned a "weight" or value. The corresponding weights are entered into a computer model which processes the weighted values resulting in a map indicating approximate locations of resource "hot spots"; areas where the greatest number of selected resources can be found. (Figure 1)

The computer model utilized in co-occurring resource inventory projects was designed and constructed by the Green Valley Institute Geographic Information Systems Center, using ESRI ArcGIS 9.2 geographic information systems software. Data sets entered into the model are in vector-based geographic information systems shapefile format. The shapefile data sets are processed into raster-based pixel data sets, with each of the pixels measuring 25 by 25 scale feet. The majority of the processed data sets cover the area of the town of interest, plus a buffer zone measuring one linear scale mile in width extending from the edge of the town boundary.

Input data are processed into two types of data sets within the computer model: those that identify a resource directly (Direct Value Inputs), and those that attach value to areas in proximity to the original data set (Proximity Inputs) (Table 1). Data sets that identify resources directly indicate areas with significant natural resources within which the potential for future development is present (e.g. not yet developed or permanently conserved). The data sets may include wetland soils, potential stratified drift aquifer areas, wildlife habitats and corridors, and parcels greater than fifty acres in area among others. Such resources may be considered valuable for wildlife habitats and potential corridors, or may contain important resources that directly affect the quality of life in and around those areas.

Inventories, continued on page 4

Town of Lebanon, Connecticut

Co-occurring Resource Inventory Map Scenario 2

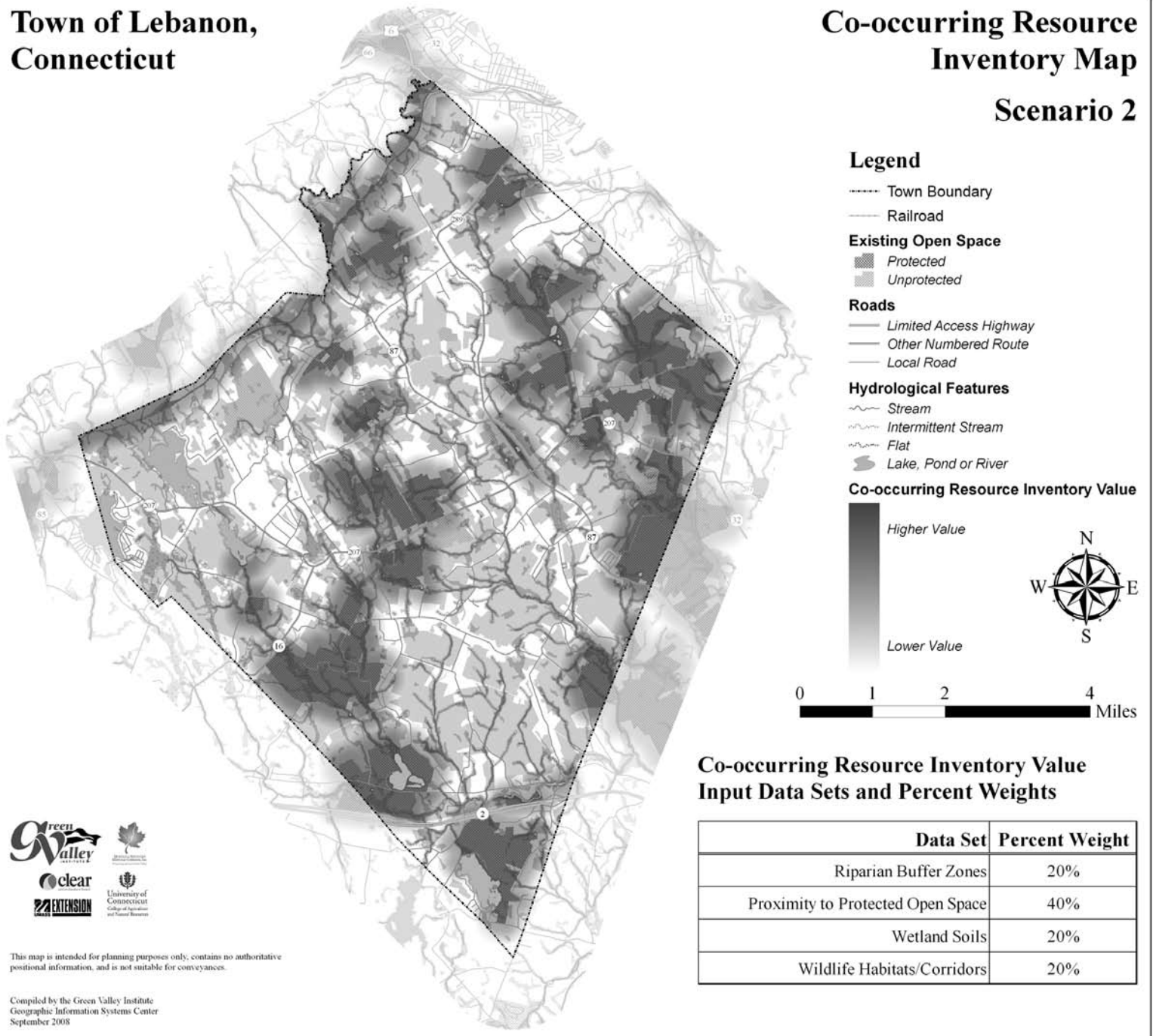


Figure 1

Data sets that identify areas in close proximity to particular natural resources such as protected open space, wetlands and streams are predicated on the fact that future development could not take place on or within a given resource area itself, but could take place in close proximity to that resource area. That proximal resource area is considered to have conservation value due to its potential use as a riparian buffer zone or other wildlife habitat or corridor. Such data sets may include areas in proximity to protected open space parcels. The GVI works with a town commission to determine the appropriate buffer. Considerations for open space buffers include land use, land cover, ownership and protection status. Riparian buffer zones should be based on surrounding land and water body use. For example a 25 foot buffer will reduce nutrient loading to a stream, while a 75-100 foot buffer will help maintain habitat for fish populations. Riparian buffer zones can include areas in proximity to perennial and intermittent streams, lakes, ponds and rivers. Within the buffer zone values are assigned such that with increasing distance from the resource (i.e. open space parcel or active waterway) the internal value decreases correspondingly in a non-linear fashion. The maximum

internal value is assigned to areas abutting the resource to correspond with the full weighting value assigned by the Conservation Commission. Toward the outer edges of the buffer zones, the values taper off approaching zero.

Co-occurring resource inventories employ an iterative process involving a number of meetings between the Conservation Commission and Green Valley Institute staff. During this process, commission members become familiar with the resources located in their town and with the available GIS data sets. While working on the project with the Lebanon Conservation Commission, members found that additional data and information were required to best accomplish the analysis of resources in Lebanon. As a result a number of innovations were implemented by Commission members and Green Valley Institute staff, both in the form of supplemental data sets and methodology.

In September, 2007 members of the Lebanon Conservation Commission determined the list of input data sets to be used in their final co-occurring analysis. Green Valley Institute prepared a computer-projected display of the template for the co-occurring resource inventory map of the Town of Lebanon. GVI also provided the Conservation Commission with a blank co-occurring resource inventory value sheet (Table 1), which included the input data sets, and three columns for selecting percent weight scenarios such that the sum of all the percent weights in each column was equal to a value of 100. Any available input data set that would not be included in a scenario receives a percent weight of zero. Using the combination of a portable laptop computer and projector, the co-occurring resource inventory model produces data for each scenario “on the fly”, permitting members of the Conservation Commission to see the results in map form almost immediately.

After discussion, the Conservation Commission selected the criteria included in the “Scenario 2” Percent Weight column in the weighting value sheet (Table 1) for the co-occurring resource inventory data set included on the final map (Figure 1). The Conservation Commission considered two other sets of weighting criteria which can be viewed and compared in color on the GVI website at www.greenvalleyinstitute.org. Throughout the co-occurring resource analysis, the Lebanon Conservation Commission made additions and improvements to the data inputs. Their local knowledge and understanding of the importance of natural resources was critical to the project. The final map

is an important conservation tool for the analysis of natural resource trends in the Town of Lebanon.

	Data Set	Percent Weight		
		Scenario 1	Scenario 2	Scenario 3
Proximity Inputs	Riparian Buffer Zones	26%	20%	15%
	Proximity to Protected Open Space	22%	40%	40%
Direct Value Inputs	Wetland Soils	23%	20%	15%
	Potential Stratified Drift Aquifer Areas	6%	0%	0%
	Wildlife Habitats/Corridors	23%	20%	15%
	Parcels Greater than 50 Acres	0%	0%	15%

Table 1: Co-occurring Resource Inventory Value Weighting Sheet

The Green Valley Institute has assisted ten corridor towns with Co-occurring Resources Inventory analyses. These towns have included the Co-occurring Resource Inventory as part of a comprehensive, town-wide resource inventory maintained by the Conservation Commission which assists them in their role of providing information and recommendations for the protection of resources to other land-use boards and commissions in their town. Several communities have used these data to help identify important resource areas for land protection efforts, wildlife corridors and Greenway Plans. Communities may use the Co-occurring Resource Inventory in the consideration of resource overlay zones such Aquifer Protection Zones, River Overlay Zones or Agricultural Zones.

The Green Valley Institute is a program of the Center for Land Use Education and Research (CLEAR), University of Connecticut Extension. The UCONN GeoSpatial Technology Program offers training courses in Geographic Information Systems (GIS) and Global Positioning Systems (GPS). These courses are geared toward training municipal officials and others who influence land use decisions, and are offered several times per year.

Further information about these courses and how to register can be found at <http://clear.uconn.edu/geospatial/training.htm>.

To learn more about the Green Valley Institute and Co-occurring Resource Inventories, visit our website [greenvalleyinstitute.org](http://www.greenvalleyinstitute.org) or contact: Michael Altshul, GIS Specialist, Green Valley Institute, michael.altshul@uconn.edu.



When Local Jurisdiction Falls Before the Will of Congress:

Hackett v. JLG Properties, LLC by David H. Wrinn

The representative of a gas pipeline company appears before your commission to advocate for a permit to conduct regulated activities in or near inland wetlands and watercourses in your town. The application is duly filed and the supporting paperwork is complete. The commission has even voted to declare the proposed work a significant activity worthy of a public hearing. But at that first session of the public hearing, the utility representative informs you that the application is only a “courtesy filing,” and that you actually have no authority to deny or condition the approval that the company seeks. The company would like to “work with you,” and use your forum to educate local citizens about the project and how it might affect them. You are perplexed, perhaps even a bit bemused by his candor. “Your jurisdiction over our project is preempted by federal law,” he tells you.

If you determine to ignore this reminder, and process a denial or approval with conditions, exercising your customary authority, you will likely find yourselves in court, as happened to the zoning commission of New Milford in a case back in 2006. Unlike our opening example, where the obvious scale and interstate nature of big energy infrastructural initiatives confirm that the jurisdictional claim is no mere dodge, the New Milford case was a setback dispute arising out of the construction of a deck by JLG Properties, LLC at its commercial marina on Candlewood Lake. What more typical local land use issue can one have than this? JLG had not secured any permits from the New Milford zoning commission and, not unexpectedly, it received a stop work order. JLG ceased construction, and applied for a site determination. The commission could not approve a building permit owing to set-back requirements in its regulations. JLG did not appeal the denial. No building permit was ever issued, but JLG completed construction. The zoning enforcement officer was authorized to bring an action in court to obtain an order from a Superior Court judge that JLG remove the unauthorized work. Defendant JLG’s defense to the suit was that of federal preemption.¹

¹ You should be aware that preemption principles also work on the state-to-local level. Wetlands agencies, for example, may have come

JLG admitted that the deck construction violated the New Milford zoning regulations “if the regulations apply to structures built below the 440 contour line.”² Candlewood Lake is an artificial body of water utilized to store water for hydroelectric power generation. The license to operate this facility belonged to a utility and it was renewed in 2004 by the Federal Energy Regulatory Commission (“FERC”) under the authority of the Federal Power Act (“FPA”). In court, there was no dispute that the deck (and a flagpole enhancement) was situated below the 440 contour line on the utility’s project property. JLG for its part had obtained a license from the utility for the construction and maintenance of the deck. The trial court summarized JLG’s defense as follows: “The defendant claims that the doctrine of federal preemption means that the Town of New Milford has no authority to regulate structures below the 440 line constructed by owners of property above the 440 line.” *Hackett v. JLG Properties, LLC*, CV-05-4002217-S (Superior Court, August 30, 2006).³ The court held that the New Milford

zoning regulations were “preempted” by federal law below the 440 contour line, thus leaving JLG free to maintain a structure that was fully non-compliant with

across the preemptive effect of the DEP Commissioner’s dam safety statutes. Under section 22a-403, the DEP, and not municipal inland wetlands agencies, applies the Wetlands Act to dam safety construction permit application proposals, and the same statute relieves respondents to the DEP’s dam safety orders from the obligation to obtain permits from local inland wetlands agencies.

² The “contour line” is a line of elevation above sea level that was used to define the topographical extent of the hydro-electric project area over which the utility had been granted the license by FERC in 1981 and in 2004 when FERC renewed the license. The FERC license stipulated that the waters of Candlewood Lake be maintained during the summer between elevation 427 and 430. The utility thus owned the lake bottom as well as a narrow band of property around the entire lake waterward of the contour line. New Milford’s zoning set-back was 50 feet from a boundary line; therefore, any building construction along the shoreline on the 10 to 20 foot band of shoreline owned by the utility would have been in violation of the set-back requirement.

³ 2006 Conn. Super. LEXIS 2610.

Hackett, continued from page 6

the requirements of New Milford's zoning regulations.⁴ On appeal, the Connecticut Supreme Court affirmed the trial court's decision, bringing preemption analysis to the attention of land use commissions unaccustomed to being ousted of jurisdiction over matters—like zoning—traditionally associated with home rule in this state. *Hackett v. JLG Properties, LLC*, 285 Conn. 498, 940 A.2d 769 (2008).⁵ How to explain this result?

Let's review the basics of preemption principles in order to provide a context within which to grasp what happened in *Hackett* and why. The law of preemption is a sprawling

⁴ As amended, the FPA, 16 U.S.C. ("United States Code") § 797(e), grants to the FERC broad authority not only to license the particulars of a hydro-electric project such as that on Candlewood Lake, but also the authority to regulate virtually all aspects of the siting and general operation of the facility, including environmental impacts, recreational opportunities and "the preservation of other aspects of environmental quality." The statute contains the following language: "[N]othing here contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." As the case was presented in *Hackett*, zoning regulations fell outside this so-called "reservation of state control."

⁵ 2008 Conn. LEXIS 50.

topic. Ours is a federal system of laws in which there are sovereign states and a "federal" government with defined powers that may override state interests in favor of those that are national in scope. Its source is the United States Constitution, Article VI, cl. 2, which states that federal law is the supreme law of the land, (hence the designation "supremacy clause"). In the broadest terms, what this means is that in a given area of regulation, the federal interest predominates and the state interest must yield. Preemption is emphatically *not* simple concurrent jurisdiction, where both sovereigns are allowed to regulate the same things. While you might be accustomed to stating, or, having your regulations state, that the issuance of a permit (e.g., a wetlands permit to conduct a regulated activity) does not "derogate" or detract from the requirement that the applicant obtain all other necessary permits (e.g., an Army Corps of Engineers authorization under the Clean Water Act or Rivers and Harbors Act), preemption, when it applies, can render your regulatory authority a legal nullity. The law accomplishes this in various ways, *expressly* and *impliedly*.

Naturally, the patterns of state and federal regulation have over the years generated a tangle of legal controversies that the courts have had to resolve. Courts have developed a set of considerations by which they examine whether, how and to what degree a given federal regulatory scheme displaces state or local law. First, in descending order of potency, the most preemptive statute is one that expressly disallows the concurrent operation of any other regulation (other than by the same sovereign, such as by another agency of the federal government). The states are told, in effect, "You cannot regulate this subject matter." Here, Congress sets out its intent to preempt in the very language of the statute itself. There are two classifications of preemptive statutes of the implied variety. One common category is that which the courts call "implied field preemption." Field

Hackett, continued on page 10

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CACIWC's 31st Environmental Conference Workshops

SESSION 1

A.1 Smart, Sustainable, Responsible Growth: What's New in Connecticut

Heidi Green, 1000 Friends of Connecticut

A discussion of ongoing policy and legislative activity on smart growth including transportation initiatives, planning, land use policies, regulations and zoning reform. Fiscal issues and regional governance issues will also be included.

B.1 What's New in 2008: Case Law, Legislative and Regulatory Update

Janet Brooks, D'Aquila & Brooks, LLC; Mark Branse, Branse, Willis & Knapp; David Wrinn, CT Attorney General's Office

Get an up to date briefing on the latest developments in wetlands cases and legislative proposals from three experienced wetlands attorneys. Half of the session will be devoted to your questions.

C.1 New Online Resources for Wetlands and Conservation Commissioners

John Rozum, CT NEMO & Emily Wilson, UConn CLEAR

This workshop will offer demonstrations of several online interactive mapping tools and new stormwater management resources available on the CLEAR and NEMO websites. These tools were designed to assist commissioners plan, evaluate and implement better stormwater management and land use planning strategies.

D.1 How to Evaluate Stormwater Management Reports and Design Calculations

Erik Mas & Phil Moreschi, Fuss & O'Neill

Which design investigations, materials and reports should be expected and requested during the application process? This workshop will include scour/erosion computations, peak rate attenuation, stormwater volume management, groundwater recharge, site plan requirements and more. For experienced commissioners.

SESSION 2

A.2 Habitat-based Management Planning

Juliana Barrett, CT Sea Grant; John Rozum, CT NEMO

The workshop will address the habitat management planning needs of town open space properties. It will provide a framework for the documentation of background information and a methodology to determine management actions, based on habitat, needed for the long term conservation of a particular site.

B.2 Exemptions in the Wetlands Act: To Regulate or Not to Regulate

Janet P. Brooks, D'Aquila & Brooks, LLC

Is your wetlands agency navigating correctly between regulated and exempt activities? This workshop will explore the substantive and procedural aspects of decision making for exemptions.

C.2 Evaluating CT Land Cover Data and Land Use Regulations Within Riparian Areas

Kate Woodruff, Emily Wilson & Chester Arnold, UConn CLEAR

See results from CLEAR's completed statewide analysis of updated land cover data (1985-2006) within 100, 200 and 300 feet of perennial waterways. "Hot spots" of greatest change were identified, and town scale data was used to investigate the relationship of changes in buffer vegetation with local regulatory practices.

D.2 Agents Forum (for Municipal Inland Wetlands Agents Only)

Darcy Winther & Steve Tessitore, CT DEP IWRD

The inaugural year of a session specifically tailored to municipal wetlands agents. The session will begin with an informal "meet and greet" followed by a brief DEP presentation. The session will wrap up with an extended open discussion of issues and concerns with colleagues and DEP.

Open Space/Resource
Conservation

Wetlands &
Watercourse Protection

Science &
Technology

Advanced



Saturday November 8, 2008

SESSION 3

A.3 Championing Agriculture in Local Planning

Jiff Martin, American Farmland Trust

This workshop, based on the recently published guide, Connecticut Guide to Planning for Agriculture, will explore the tools available to municipal leaders to plan a future for agriculture in their community. Examples will be provided of steps taken by many communities and agricultural exemptions will be discussed.

B.3 River-Friendly Stream Crossing Design

Shelley Green & Adam Whelchel, The Nature Conservancy

There is growing recognition that inadequately designed culverts and bridges can pose a significant challenge to river systems and species. This workshop will cover river-friendly design for stream crossings and share lessons learned in working with local departments of public works on road construction and maintenance practices.

C.3 Organic Fertilization: Greening Your Lawn Without Greening Your Waterway

Scott Reil, SafeLawns and Landscapes, LLC

This workshop will provide an overview of organic culture of lawn and landscape, with emphasis on reducing chemical fertilizer and pesticide use that directly affects local water quality. A live demonstration of microbiology in a liquid compost extract is included.

D.3 How to Evaluate the Appropriate Use and Effectiveness of Proprietary Stormwater Treatment Systems

Erik Mas & Phil Moreschi, Fuss & O'Neill

Geared to experienced commission members, this workshop will provide a process to assess when and how proprietary systems are appropriate. Evaluation of system sizing, pollutant removal rates and efficiency will be covered as will operation and maintenance requirements.



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preemption results from the effect of the passage of an enactment, or several enactments, treating various aspects of a subject matter such that, after surveying “the field” of the operation of these laws, a court concludes that Congress has determined “to occupy the field,” leaving no room for concurrent state or local law. The other category, termed “conflict preemption,” also implied from examination of the federal enactment’s field of operation, describes situations where it is impossible to comply with both a federal and an applicable state law, or where the state law is determined to present an obstacle to the “accomplishment and execution of congressional objectives.”

Implied field preemption involves a review of all related enactments as well as the regulations of administrative agencies. The court is trying to infer what the intent of Congress was with respect to allowing regulation by others. *Hackett* is an example of implied field preemption.⁶ The Court examined the FPA, its history and the decisions of the United States Supreme Court interpreting it, and agreed that the act constituted a “complete scheme of national regulation” designed to “promote the comprehensive development of the water resources of the [n]ation . . .” There was no “room” in which the New Milford zoning regulations could operate; they were “squeezed out” by the FPA.

⁶ The concurrence of Justice Katz would have analyzed the issues in *Hackett* as falling under conflict preemption principles. Her concurrence laid great emphasis upon the principle of construction that in areas of law traditionally regulated by the states (such as land use under the states’ “police powers”), courts assume that Congress did not intend to supersede them without a clear and manifest intention to preempt state law. As a result, her analysis was based upon the narrower ground of conflict, because that preserved questions about the breadth of the “field” of preemption of local law under the FPA to future cases. This is an example of “incremental” reasoning, and it is very tightly grounded in the facts of the case: it was “impossible” to comply with the New Milford setback and build the deck under the license provided by the utility.

In *Hackett*, New Milford nevertheless tried to obtain the protection afforded by a statutory exception set out in the FPA, but our Supreme Court concluded that the reasoning of two U.S. Supreme Court cases, *First Iowa* and a more recent case, *California v. Federal Energy Regulatory Commission*, 495 U.S. 490 (1990), would rule these regulations *outside* this exception. Thus, the zoning regulations were preempted as they might otherwise apply to JLG’s deck. In other words, if the deck construction fell *outside* this statutory exception, it inexorably fell *within* the implied field of federal regulation of hydroelectric power projects.⁷

Preemption cropped up in a recent Connecticut inland wetlands enforcement case, but no preemption was found by the trial court. In a case involving the clear-cutting of floodplain forest, the East Haddam Inland Wetland and Watercourses Commission brought suit against the Goodspeed Airport for having conducted regulated

⁷ The Court turned aside a further argument that the FERC’s FPA regulations governing recreational uses within licensed project areas required the licensee to comply with federal, state and *local* requirements “for health, sanitation, and public safety...” The Court determined that New Milford’s zoning setback regulations did not “directly” address health and sanitation within the recreational use.

Hackett, continued on page 11

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Hackett, continued from page 10

activities without any permit or authorization. *Ventres v. Goodspeed Airport, LLC*.⁸ As in *Hackett*, the defense was federal preemption, and in this case the defendants (the airport LLC and its sole member) pointed to the Federal Aviation Act regulations and agency published guidelines. The defendants claimed that the federal statute and Federal Aviation Administration regulations and guidelines rendered the application of East Haddam's regulations inapplicable to them, because the activity that they had undertaken related to their operation of an airport.⁹

The trial court in *Ventres* addressed the preemption issues in the case.¹⁰ It noted that there is a presumption against finding federal preemption of otherwise applicable state

⁸ 2004 Conn. Super. LEXIS 1316.


⁹ *Ventres v. Goodspeed Airport, LLC*. In a companion enforcement case, the Commissioner of Environmental Protection filed a suit against the airport and its owner under the Connecticut Environmental Protection Act. *Rocque v. Mellon*. The defendants also claimed that the FAA statute and associated regulations preempted this state statute as well as the state Wetlands Act.

¹⁰ The Connecticut Supreme Court affirmed the judgment in favor of the IWWA and the Commissioner of Environmental Protection against the airport on grounds other than those of preemption.


or local law,¹¹ but concluded from an examination of the statutory scheme of the Federal Aviation Act and regulations that there was no express preemption and that there was no implied field preemption as well. It also found that the airport could comply with both regulation by the East Haddam I.W.W.A. and the Federal Aviation Administration under the facts presented. There was no conflict; the two regulatory regimes touched only "remotely and tangentially," according to the court.

What are the practicalities of preemption's figuring into local land use decisions? Well, obviously, each circumstance in which there is a claim of preemption should be analyzed independently. Preemption claims are sensitive to both law and fact; hence, consultation with the town attorney over specific issues and the pertinent statute(s) is advised. This is particularly true where the statutory scheme narrows the otherwise preemptive effect of the federal statute and where there may nevertheless be room for the local regulation to operate, or operate in circumstances where the facts are altered (so-called incremental determinations within an assigned legal category). And finally, a complete administrative record is, as always, indispensable for adequate judicial review because, for example, where there is room for the operation of local law, the facts upon which the preemption analysis will be based are critical to the analysis.

¹¹ See note 7, above.

David Wrinn is an Assistant Attorney General in the Environment Department of the Attorney General's Office. The views expressed herein are those only of the author and are not to be construed as an informal or formal advice of the Office of the Attorney General of the State of Connecticut. 

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2008 Environmental Legislation Review

To review the language and history of bills go to <http://www.cga.ct.gov/>; put in the bill number in the "quick search" section at the top of the page.

Please take the time to thank your legislators and Governor Rell for their continued support of the environmental issues and the legislation passed this year. Legislators and the Governor need to know that their constituents appreciate their efforts and are watching how they respond to their interests.

State revenue projections curtailed any possibility of adding new funds to critical environmental programs including modest funding for DEP inland wetlands staff, clean water funds for municipal sewage infrastructure, and funds for DEP's open space matching grant program.

Below is a summary of the passage or demise of key environmental legislation.

INCREASE FUNDING FOR DEPARTMENT OF ENVIRONMENTAL PROTECTION

A coalition of environmental groups requested an additional \$5 million in funding from the Appropriations Committee to restore and strengthen critical environmental protection programs of the Department of Environmental Protection. When the budget came out there was an additional \$3M for DEP staffing. Unfortunately when the legislature decided to make no changes to the biennial budget, passed in the 2007 session, the additional DEP funding was a casualty. Additional funding for DEP staff will be pursued next year.

INLAND WETLANDS AND RELATED "WATER" LEGISLATION

There were two significant inland wetlands bills: **House Bill 5603. An Act Concerning Enhancements to the Inland Wetlands and Watercourses Act.** Status: Made it to the Planning & Development Committee where it died without a vote; HB 5603 would have helped remedy the wetlands law that has been seriously weakened by recent Connecticut Supreme Court interpretations. If legislation had passed it would have clarified that:

- the primary purpose of the Act is to protect wetlands;
- the **applicant** must demonstrate that they are entitled to a wetlands permit; and
- local wetlands commissions can listen to a wide

array of relevant evidence in reaching their decision, including direct field observations, state DEP and DPH recommendations and other professionally based recommendations.

Senate Bill 362. An Act Concerning Riverfront Protection. Status: Passed the Environment and Appropriations Committees but died in Planning and Development on a close 9 to 10 vote. SB 362 would create a regulated 100' vegetated riparian area along both sides of all rivers and streams to reduce non-point pollution from reaching drinking water supplies, impacting critical fish habitats and recreational opportunities, and from polluting Long Island Sound. Regulation would be the responsibility of local inland wetlands commissions.

Other Water-Related Bills:

Senate Bill 359. An Act Appropriating Funds to the Clean Water Fund. Status: After a favorable 28-0 vote in the Environment Committee, it fell victim to the State's fiscal crisis. The funds would provide \$100M for municipal sewage treatment infrastructure.

Legislation, continued on page 13

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Legislation, continued from page 12

House Bill 5900. An Act Concerning Watershed Lands.

Status: Was heard by the Public Health Committee but they did not vote on it. The bill would have given the Department of Public Health powers to protect water company land on public drinking water supply watersheds.

Senate Bill 434. An Act Excluding Environmentally Sensitive Areas from the Affordable Housing Land Use Appeals Process. *Status: Environment Committee held a public hearing but did not vote on it.*

Mining on Water Company Land: Legislation was introduced early in the 2008 legislative session that would open Water Company land to commercial mining. Massive opposition to this bill ensured that it did not make it out of the public health committee.

OPEN SPACE AND AGRICULTURAL LAND PRESERVATION AND PROTECTION

Public Act 08-174. An Act Concerning The Face of Connecticut Steering Committee and the Preservation of farmland.

Status: The legislature passed and the Governor signed PA-08-174. For the second year the bill fell short of its financial goals as it became another victim to the State's budget crisis. However the Face of Connecticut Campaign was successful in establishing a Face of Connecticut Steering Committee which will direct an integrated approach to the protection of open space, farmland, historic properties, and city centers. It was amended to include brownfield remediation. For more information please see the Face of Connecticut web site; <http://:faceofconnecticut.com/>.

House Bill 5873 (PA 08-174): An Act Concerning Community Farms Preservation Program - The Commissioner of Agriculture and the Farmland Preservation Advisory Board may establish regulations for a program that would preserve farm parcels that do not currently meet the criteria of the CT Farmland Preservation Program for reasons of size or location. This program is NOT funded, however Working Lands Alliance is pleased that the legislation may add momentum to ongoing discussions about how the state might invest in **the preservation of smaller, locally important farm properties.**

House Bill 5873 (In PA 08-174). Increases the Max Price/Acre for Development Rights - The Commissioner of Agriculture, subject to a certified appraisal, may offer up to \$20,000/acre for the purchase of development rights

Legislation, continued on page 14

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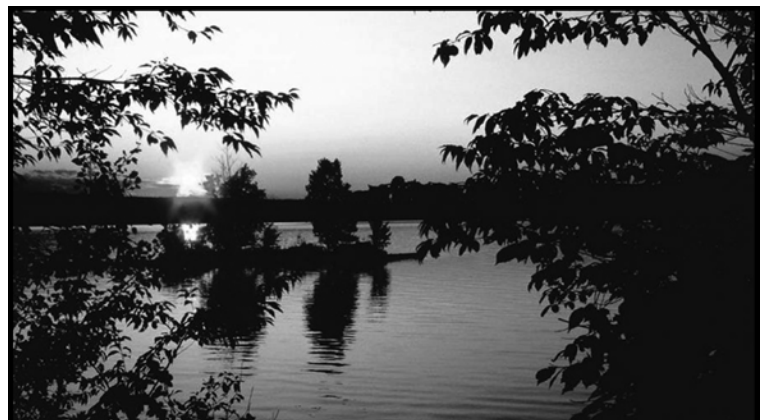
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on qualifying farmland. Previously the Dept. of Agriculture had a policy to contribute no more than \$10,000/acre to a project (although landowners may receive a higher price/acre if there are other project partners). This doubling in the max price/acre also applies to the Joint Town-State Farmland Preservation program. The Commissioner is under NO obligation to pay the max price; this legislation makes explicit the max price the agency may be willing to pay. **The increase enhances the potential for a community to maintain an agricultural landscape base.**

OPEN SPACE MANAGEMENT

House Bill No. 5602, An Act Concerning the Designation of All-Terrain Vehicle Trails, A Trail User Fee, and All Terrain Vehicle Registration. *Status: The bill passed Environment, Appropriations and Transportation but was not called for a floor vote in the House.* The bill attempted to solve the feud between ATV owners and the majority of those that are associated with the environment, and management of open space and farm land. The bill would have required DEP to designate 4 trails on state land for ATV use by January 2009, instituting a 1% tax on ATV sales to support trails, and requiring DMV to set up a registration system 180 days before the trails open. It will be back in 2009.

Senate Bill 358, An Act Concerning Invasive Plants. *Status: Passed Environment and Planning and Development Committees but died in Judiciary Committee without a vote.* The bill would have given the CT Agriculture Station additional inspection powers of nurseries for listed invasive species, allow research and education for these species and included reproductive parts of the plants in the prohibitions.

Exemption for Open Space Land Held By or for Certain Corporations: *Status: In PA 08-174.* The amendment reverses a recent unfavorable court decision which required a land trust to pay property taxes on land on which it could not demonstrate that there was a charitable purpose beyond its intrinsic open space value. 



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Resources

CT Clean Energy Communities Program

The Sherman Conservation Commission has set an example of how commissions can become involved in initiating this program for their towns. "The Sherman Conservation Commission was very excited to learn about the Connecticut Clean Energy Communities Program and pleased to bring it to our town for consideration," said Joe Keneally, chairman, Sherman Conservation Commission. "We are very happy that the town has made this pledge to clean energy and will work hard to encourage people in Sherman to sign up for renewable electricity." For more information about the Connecticut Clean Energy Communities Program, 20% by 2010 Clean Energy Campaign, and CTCleanEnergy Options, visit www.ctcleanenergy.com/communities/cced.php.

New Agricultural Planning Tool

The American Farmland Trust (AFT) and Connecticut Conference of Municipalities (CCM) are pleased to announce the completion of "Planning for Agriculture: A Guide for Connecticut Municipalities." Beginning this fall 2008, a statewide outreach phase will accompany this new resource.

Planning for Agriculture is a resource that will offer information and tools to help leaders understand and address the economic and land use needs of farmers, and the impacts of local bylaws and policies on agriculture. It covers topics such as the benefits of farms, how to involve farmers in subdivision regulations, and financing local farmland protection programs. This new tool will be useful to selectmen, conservation commissions, planning & zoning commissions, planners, assessors, health boards, regional planning agencies and others. In the coming year, AFT and CCM are planning to widely disseminate the guide and provide many outreach presentations for a variety of key stakeholders, including municipal leaders, county Farm Bureau members, and regional planning decision makers. The guide and additional resources will be available soon online at www.ctplanningforagriculture.com.



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Segment III - Connecticut Department of Environmental Protection Inland Wetlands Training Program

The Department of Environmental Protection will be offering Segment III of the 2008 Municipal Inland Wetland Commissioners Training Program in October. This field workshop will cover soils and the relationship of soils to water quantity and quality. Segment III will begin in the classroom with a series of morning presentations. The program will continue with an afternoon field visit to further explore the subject matter. Exact dates and locations are to be determined. Further information is available on the DEP website in September. In addition, each municipal inland wetlands agency will be mailed a brochure, along with a voucher allowing one person from each town to attend at no cost, in early September. Contact Darcy Winther or Carl Zimmerman, DEP Wetlands Management Section, (860)424-3019.



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See pages 8 and 9 for details.

Keynote Speaker and Address - Karl Wagener, Executive Director of Connecticut Council on Environmental Quality - "Is Connecticut Really Doing Enough to Conserve Land and Scenic Resources?"

See page 1.