



Journey to the Legal Horizon

by Attorney Janet Brooks

Pesticides and the Wetlands Act

In general, the application of pesticides to wetlands and watercourses is a regulated activity.

If someone had asked me six months ago to write an article that the application of pesticides to a wetland or watercourse is an activity triggering the need for a wetlands permit, I would have responded: it is so self-evident from reading the wetlands statute that no one would read the article. However, news in 2017 from communities around the state has persuaded me that it is appropriate to examine how the wetlands act applies to pesticide applications. A review of the exemption provisions of the wetlands act confirms the need to temper my broad statement acknowledging some pesticide uses may be found to fall within a number of the statutory exemptions.

In two circumstances of which I am aware, citizens opposing the application of pesticides in large waterbodies have focused on DEEP's issuance of an aquatic pesticides permit. Such state permit, set out in General Statutes § 22a-66z, addresses "the introduction of chemicals into the waters of the state for the control of aquatic vegetation, fish populations or other aquatic organisms." This permit is processed by the Pesticides Management Program of DEEP. More about the permit later.

Neither of the situations appears to be filing applications for municipal wetlands and watercourses permits. Why does the application of a pesticide to a waterbody require a wetlands permit? Let's start with some terminology. A "regulated activity" includes the "deposition of material" into a waterbody.¹ "Material" means any substance.² Turning to the pesticides statutes, a pesticide is defined as: "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, or any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant."³ Thus, "pesticide" is the umbrella term which includes herbicides, insecticides, fungicides and other "-cides." Since a pesticide is a substance (per the pesticides statutes) and a substance is a material (per the wetlands statutes) putting pesticides in a waterbody is "deposition of material."

We're not done yet with our inquiry because the definition of "regulated activity" excludes activities listed in the statutory exemptions section. To begin, there is no exemption for activities which receive a 22a-66z permit from DEEP.

In contrast, there is a general exemption for wetland or watercourse restoration or mosquito control for activities conducted by or under the authority of DEEP.⁴ So, we go exemption-by-exemption through General Statutes § 22a-40 to determine if the facts in a given application would qualify for the exemption. In each case the person claiming the exemption has the burden proving it.

The first category, gardening and farming, presents a possibility of exempt pesticide use. If the person claims the pesticide is to be used in a farming setting, such use, in my opinion, is not a regulated activity. Next, I wonder about the exemption for "uses incidental to the enjoyment and maintenance of residential property."⁵ That exemption specifically excludes "significant amounts of material from or onto a wetland or watercourse." Can homeowners establish that pesticide treatments for mosquitoes (to thwart West Nile disease) or ticks fall within the exemption? If they do, such activities would be exempt. As always, exemptions are so fact-specific and are determined on a case-by-case basis.

The treatment of a recreational waterbody for weeds is not likely to fall into any of the statutory exemptions. Thus, a wetlands permit will be required. Is there a reason to ban pesticide use in general? No. I compare it to antibiotic use. Pesticides, like antibiotics, may have been overused and unnecessary, but there may be circumstances which call for each. I have been involved in restoration efforts to control invasive plants where judicious use of pesticides was critical to the success of the project. Again, fact-specific.

At least one municipal wetlands commission has specifically addressed the application of pesticides and fertilizers, in its definition of "regulated activity": "The Commission has determined that the application of herbicides, pesticides and fertilizers within fifty (50) feet of any wetland or watercourse will cause or has a reasonable likelihood of causing an adverse impact and therefore such applications shall not be permitted without a permit pursuant to these regulations."⁶ Such a regulation is not necessary in order for a commission to regulate the application of pesticides. As established above, in general, the application of pesticides is a regulated activity. A note: that municipal regulation cannot erode the activities exempt by statute. If the pesticide application falls within

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a statutory exemption, that municipal regulation cannot serve to recast the activity as “regulated.”

Once an activity is a regulated activity, all of the rules apply for issuing permits. In order to vote to grant a permit to apply pesticides, it won't be enough to have residents testifying in support of a weed-free lake so they can enjoy swimming and boating. Nor will it be sufficient to have residents opposing pesticide use in general as a reason to deny a permit. The decision must be supported by expert evidence.

Back to the DEEP-issued 22a-66z aquatic pesticide permit. The focus for DEEP is on the federal pesticide label: is the pesticide going to be used for a target pest listed on the label and will it be applied per label instructions? In some instances some other considerations are added, if the location is within the ambit of the Coastal Management Act, if species of special concern are present, if the waterbody flows to a public water supply. The statute does not authorize public hearings on such application. For those trying to shoehorn more public process into the § 22a-66z permit, they would be better served by turning to the state wetlands act which has an established procedure and substantive body of law carried out in towns across the state by municipal wetlands and watercourses agencies.

In preparing this article I had the opportunity to speak with Valerie Bodner, DEEP Pesticides Management Program and Darcy Winther, DEEP Inland Wetlands and Watercourses Program. Both programs at DEEP are in synch that municipal wetlands agencies retain their jurisdiction over regulated activities and are not preempted by § 22a-66z from issuing municipal wetlands and watercourses permits for pesticide applications to waterbodies.

Let's continue this topic with your questions and comments at the CACIWC annual meeting. Join me for Session 2: Wetlands Law & Regulations Update, 11:30 am – 12:30 pm.

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(Endnotes)

¹CGS § 22a-38 (13), definition of “regulated activity.”

² CGS § 22a-38 (6), definition of “material.”

³ CGS § 22a-47 (w), definition of “pesticide.”

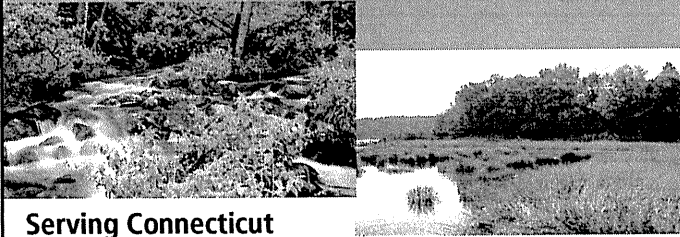

⁴CGS § 22a-40 (a) (1).

⁵ CGS § 22a-40 (a) (4).

⁶ Roxbury Inland Wetlands and Watercourses Regulations § 2.1bb. ↴

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