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TO: Members of the General Assembly Environment Committee Riparian Buffers Working Group

DATE: December 9, 2025

RE: Draft language for consideration for amendment to the Inland Wetlands & Watercourses Act

In further consideration of the comments made at the December 3rd Riparian Buffers Working Group meeting I revised my previously submitted draft language dated December 2nd. I have included a few items that provide more focused, unambiguous statutory authority for the benefit of lay, volunteer commission members and the public at large. I also had the opportunity to review my draft with Judge Marshall K. Berger, retired, who created and presided over the land use docket for 15+ years.

1. I considered the oral comments of DEEP counsel Eliza Heins and have revised my draft language since the meeting at which I read aloud my draft. I have inserted the New Hampshire legislative findings (with some adjustment for terminology used in CT laws) after the second sentence of the **existing** statutory legislative finding (see underlined bolded language below). Judge Berger offered some additional deletions and additions which I have incorporated.

Sec. 22a-36. Inland wetlands and watercourses. Legislative finding. The inland wetlands and watercourses of the state of Connecticut are an indispensable and irreplaceable but fragile natural resource with which the citizens of the state have been endowed. The wetlands and watercourses are an interrelated web of nature essential to an adequate supply of surface and underground water; to hydrological stability and control of flooding and erosion; to the recharging and purification of groundwater; and to the existence of many forms of animal, aquatic and plant life. **The riparian areas of the watercourses of the state are among the state's valuable and fragile natural resources and their protection is essential to maintain the integrity of the waters of the state, in that: a natural vegetated area, consisting of trees and/or other vegetation located in areas adjoining watercourses, functions to intercept surface runoff, wastewater, subsurface flow, and deeper groundwater flows from upland sources and to remove or minimize the effects of nutrients, sediment, organic matter, pesticides, and other pollutants and to moderate the temperature of the near-shore waters; and that scientific evidence has confirmed that even small areas of impervious surface coverage can have deleterious impacts on water quality and the aesthetic beauty of the state's watercourses if**

not properly contained or managed. Many inland wetlands and watercourses **including riparian areas** have been destroyed or are in danger of destruction because of unregulated use by reason of the deposition, filling or removal of material, the diversion or obstruction of water flow, the erection of structures and other uses, all of which have despoiled, polluted and eliminated wetlands and watercourses. Such unregulated activity has had, and will continue to have, a significant, adverse impact on the environment and ecology of the state of Connecticut and has and will continue to imperil the quality of the environment thus adversely affecting the ecological, scenic, historic and recreational values and benefits of the state for its citizens now and forever more. The preservation and protection of the wetlands and watercourses **including riparian areas** from random, unnecessary, undesirable and unregulated uses, disturbance or destruction is in the public interest and is essential to the health, welfare and safety of the citizens of the state. It is, therefore, the purpose of sections 22a-36 to 22a-45, inclusive, to protect the citizens of the state by making provisions for the protection, preservation, maintenance and use of the inland wetlands and watercourses **including riparian areas** by minimizing their disturbance and pollution; maintaining and improving water quality in accordance with the highest standards set by federal, state or local authority; preventing damage from erosion, turbidity or siltation; preventing loss of fish and other beneficial aquatic organisms, wildlife and vegetation and the destruction of the natural habitats thereof; deterring and inhibiting the danger of flood and pollution; protecting the quality of wetlands and watercourses for their conservation, economic, aesthetic, recreational and other public and private uses and values; and protecting the state's potable fresh water supplies from the dangers of drought, overdraft, pollution, misuse and mismanagement by providing an orderly process to balance the need for the economic growth of the state and the use of its land with the need to protect its environment and ecology in order to forever guarantee to the people of the state, the safety of such natural resources for their benefit and enjoyment and for the benefit and enjoyment of generations yet unborn.

2. Comments have been received by the Working Group or made by its members that commissions desire more explicit statutory authority regarding regulation of vegetation. Vegetation is certainly implicit in the meaning of material, which the Connecticut Supreme Court held explicitly in one of the two Mellon tree cutting cases on the Connecticut River. Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 138 (2005) ("If the removal of all vegetation growing in a wetlands area was not intended to be a regulated activity, we would be hard pressed to imagine what type of material the legislature had in mind in enacting § 22a-38 (13").) But if twenty years later wetlands commissions are unclear whether "material" includes "vegetation," I propose the following one-word amendment to the definition of "material" (see underlined bolded language):

§ 22a-38 (6) "Material" means any substance, solid or liquid, organic or inorganic, including, but not limited to **vegetation,** soil, sediment, aggregate, land, gravel, clay, bog, mud, debris, sand, refuse or waste;

I also adopt the language of Alicea Charamut, Rivers Alliance for "natural vegetative cover," (with a minor revision to the statutory reference) also within the definitions section, § 22a-38:

NEW (19) "Natural Vegetative Cover" means naturally occurring and adapted shrubs, trees and other plants, but does not include lawns or manicured grass areas and invasive plants included on the list of plants considered to be invasive or potentially invasive annually published and periodically updated pursuant to § 22a-381a.

3. Members of the Working Group spoke of wanting to have DEEP develop a regulatory standard. In that case, that duty should be included in § 22a-39, Duties of commissioner. Judge Berger believes that there must be a voluntary commitment from DEEP to agree to promulgate the regulation prior to any bill proceeding. He believes there is no point in passing this law without DEEP support as it will only hold up municipal wetlands commissions from regulating activities in riparian areas.

NEW § 22a-39 (o): on or before (DATE TO BE INSERTED) adopt regulations in accordance with the provisions of chapter 54 establishing vegetative control measures and/or vegetation requirements for the riparian areas to protect the adjacent watercourses.

4. To address Rep. Dubitsky's comment that the burden of proof should remain on the applicant, I offer the following language to reverse the Supreme Court's holding in River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission, 269 Conn. 57, 76-77 (2004). In that case the agency denied an application, which the Supreme Court reversed, referring to the lack of an agency finding of "actual adverse impact." Judge Berger is in strong support of such legislative revision. I propose the additional language in § 22a-42a (c) (1):

(c) (1) On and after the effective date of the municipal regulations promulgated pursuant to subsection (b) of this section, no regulated activity shall be conducted upon any inland wetland or watercourse without a permit. Any person proposing to conduct or cause to be conducted a regulated activity upon an inland wetland or watercourse shall file an application with the inland wetlands agency of the town or towns wherein the wetland or watercourse in question is located. The application shall be in such form and contain such information as the inland wetlands agency may prescribe. **The burden of proof is on the applicant, to establish that a permit may issue and to establish that no actual adverse impacts will occur from the proposed activities**. The date of receipt of an application shall be determined in accordance with the provisions of subsection (c) of section 8-7d. The inland wetlands agency shall not hold a public hearing on such application unless the inland wetlands agency determines that the proposed activity may have a significant impact on wetlands or watercourses, a petition signed by at least twenty-five persons who are eighteen years of age or older and who reside in the municipality in which the regulated activity is proposed, requesting a hearing is filed with the agency not later than fourteen days after the date of receipt of such application, or the agency finds that a public hearing regarding such application would be in the public interest. An inland wetlands agency may issue a permit without a public hearing provided no petition provided for in this subsection is filed with the agency on or before the fourteenth day after the date of receipt of the application. Such hearing shall be held in accordance with the provisions of section 8-7d. If the

inland wetlands agency, or its agent, fails to act on any application within thirty-five days after the completion of a public hearing or in the absence of a public hearing within sixty-five days from the date of receipt of the application, or within any extension of any such period as provided in section 8-7d, the applicant may file such application with the Commissioner of Energy and Environmental Protection who shall review and act on such application in accordance with this section. Any costs incurred by the commissioner in reviewing such application for such inland wetlands agency shall be paid by the municipality that established or authorized the agency. Any fees that would have been paid to such municipality if such application had not been filed with the commissioner shall be paid to the state. The failure of the inland wetlands agency or the commissioner to act within any time period specified in this subsection, or any extension thereof, shall not be deemed to constitute approval of the application.

5. I have redrafted my prior revision to reflect the Working Group's desire to have DEEP promulgate a regulation on which agencies may rely. I crafted a "before" and "after" scenario. There are currently a handful of municipal wetlands commissions regulating vegetative cover and I didn't want to interfere with their ongoing administration of their own regulations while awaiting the DEEP regulation.

   I heard Working Group members express interest in a "rebuttable presumption" regarding regulating vegetative cover. I researched examples of when rebuttable presumptions occur, either in a statute or by judicial opinion. They generally involve simple findings of fact, not based on expert opinions. In the statutory context, there is a rebuttable presumption in C.G.S. § 52-183 that the operator, if he is other than the owner of the motor vehicle, shall be presumed to be the agent and servant of the owner of the motor vehicle and operating it in the course of his employment. Or, by judicial opinion, there is a rebuttable presumption that ex parte communication, outside of a duly noticed public meeting, between a commission member and another person on a pending application is prejudicial. See Norooz v. Inland Wetlands Agency, 26 Conn. App. 564, 569 (1992). I would expect many applicants would take advantage of the "rebuttable presumption" concept and put on their experts to claim the vegetative cover is unnecessary. ***This would then require the agency to rebut the applicant's position with an expert. The agency is no better off with a "rebuttable presumption" than it is today. The agency will need to hire an expert.*** If the goal is to provide unambiguous statutory authority and rely on DEEP expertise as articulated in a regulation, I see a "rebuttable presumption" as a step backwards and thus offer no language for it. Judge Berger strongly opposes injection of a "rebuttable presumption" into the Inland Wetlands and Watercourses Act. Instead, I offer language that authorizes agencies to impose a condition re-natural vegetative cover but leaves such a condition to the discretion of the agency. Judge Berger does not support this language unless and until DEEP voluntarily commits to promulgating a regulatory standard. If the bill is passed without DEEP support or DEEP is unable to promulgate regulation in a timely fashion, it will render the protection to riparian areas uncertain and take years to implement.

draft NEW § 22a-42a (d) (3):

Because of the known ecological benefits, as stated in § 22a-36 as revised, to the riparian area from natural vegetative cover, agencies are authorized to include a condition in a permit or in an enforcement order requiring such natural vegetative cover consistent with the regulations promulgated by the commissioner pursuant to § 22a-39 (o). Prior to the promulgation of the regulation by the commissioner, a condition in either a permit or enforcement order requiring natural vegetative cover in riparian areas may be imposed on a case-by-case basis or adopted by municipal regulation where there is ecological support in the administrative record. Upon the promulgation of a regulation by the commissioner, riparian areas of greater size may be imposed by agencies on a case-by-case basis or adopted by municipal regulation where there is ecological support in the administrative record.

6. There are instances in the statutory exemption where the topic of vegetation is either ambiguous by case law or could use an assist with more explicit language. I propose both below. In the agricultural exemption the landscape has been muddied by a Supreme Court decision that includes language that both supports an agency requiring a permit for a farm road directly related to the farming operation if it uses materials (what road doesn't?) and in the next sentence concludes that the agency had no discretion pursuant to condition the construction of a gravel access road as it fell within § 22a-40(a)(1). *Indian Spring Land Company v. Inland Wetlands and Watercourses Agency,*322 Conn. 1, 19 (2016). The construction of farm access roads and construction of barns and other farming structures often involves the removal of vegetation. That removal should be explicitly allowed.

   As for the second example, agencies are inconsistently requiring permits for the removal of invasive species, sometimes with exorbitant permit fees. Removal of invasives is a positive act and falls with the "nonregulated use" of § 22a-40 (b) (1), "conservation of . . . vegetation." Some explicit language would remove any ambiguity a commission might have.

Sec. 22a-40. Permitted operations and uses**.** (a) The following operations and uses shall be permitted in wetlands and watercourses, as of right:

(1) Grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less essential to the farming operation, **road construction or the erection of buildings directly related to the farming operation, including the removal of vegetation and trees necessary for such construction/erection**, and activities conducted by, or under the authority of, the Department of Energy and Environmental Protection 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;

. . .

(b) The following operations and uses shall be permitted, as nonregulated uses in wetlands and watercourses, provided they do 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:

(1) Conservation of soil, vegetation, water, fish, shellfish and wildlife, **including but not limited to the removal of invasive species**;

Judge Berger would not alter the exemption provisions within a bill on riparian areas, believing the need for amending § 22a-40 is far greater than a focus on riparian areas; he is willing to meet with others to work on that larger revision. While I agree that a more comprehensive rewrite of the exemption provisions would be very helpful to lay, volunteer commissions, I could not pass up the opportunity to address aspects of the exemption provisions relating to vegetation in a vehicle that apparently has traction.