PULLMAN & COMLEY

A publication of Pullman & Comley, LLC

Connecticut 2018 Environmental Legislative Update: End of Session Wrap-Up Report

June 1, 2018

by Christopher P. McCormack

Throughout Connecticut's legislative session, these updates highlight developments concerning environmental law and policy. The author prepares updates as Legislative Liaison of the Connecticut Bar Association's Environmental Law Section. Pullman & Comley is pleased to offer them in this format to a wider audience.

As the session proceeds, early updates will alert readers to proposals on a broad range of issues concerning the environment, narrowing focus over time on bills that continue to progress, and concluding with a post-session wrap-up of bills that pass as well as noteworthy also-rans. Along the way they'll summarize and challenge arguments pro and con, examine the policy and science behind proposals, and occasionally cast a side glance at the vicissitudes and vagaries of the process. The views expressed will be the author's own, not necessarily those of Pullman & Comley LLC.

Questions, comments, requests and suggestions are always welcome. Please contact one of our Environmental attorneys.

With the 2018 session in the rear-view mirror, and nothing outstanding on the scale of the budget hangover that persisted last year well into the fall, we can declare the regular legislative season over. Herewith the winners, the notable also-rans – and the much-awaited (everyone is saying) Bonus Legislative Update of the Year.

Passed Bills: Significant 2018 Environmental Public Acts

PA 18-82: Climate Change and Resiliency

This act on climate change planning and resiliency contains four principal elements: adoption of a Connecticut-defined benchmark for sea level rise projections in lieu of a NOAA reference; linkage of the "municipal coastal boundary" to the new benchmark; making the Council on Climate Change a permanent body; and linking electricity generation policy more explicitly to greenhouse gas emission goals. The latter is

accomplished by incorporating references to those goals in a number of provisions of existing law concerning electricity generation and implementation of the Comprehensive Energy Strategy. Section 7 of the Act adds an interim greenhouse gas reduction goal. Connecticut had already targeted reductions (against a 1990 baseline) of 10% by 2020 and 80% by 2050; the bill defines an interim goal of 45% reduction by 2030.

Perhaps the most interesting aspect of the bill is the adoption of a state-specific benchmark for sea level rise. The NOAA benchmark reportedly understates impact by failing to account for conditions local to New England and Long Island Sound. So apparently … it could be worse? Great. The University of Connecticut will be developing it and DEEP will hold public hearings on updates before publication. The Act contemplates that this benchmark will be used for diverse purposes including emergency planning.

PA 18-85: Brownfield Grant and Loan Programs; Activity/Use Limitations

This bill started out as SB 268 (File Copy 389) to **extend the term limits for loans under the Targeted Brownfield Development Loan Program** from twenty to thirty years. That portion passed as Section 1 of the Act. So if your Senator has been promising to vote for term limits … mission accomplished?

The final bill picked up six new sections, five of which fall more or less in the brownfield category. The most brownfield-y of the new provisions are PA 18-85 sections 5 and 6. Sections 2 through 4 involve the more peripheral but still important "notice of activity and use limitation" option for imposing environmental use restrictions in connection with remediation.

Section 5 of the Act amends Conn. Gen. Stat. §32-763, the **remedial action and redevelopment municipal grant program** within DECD, to provide that if a grant recipient is not subject to the Transfer Act, it must enter a remediation program under Sections 22a-133x, 22a-133y, 32-768 or 32-769. "Getting with the program" in that sense would not be required if the grant is only for abatement of building materials, solely for site assessment, or is for a municipality, brownfield land bank, etc. to develop a comprehensive plan for multiple sites. This change conforms the grant program to the brownfield loan provisions that already contain a similar requirement.

Section 6 of the Act amends Conn. Gen. Stat. §12-81r to allow municipalities to enter into **tax abatement arrangements with prospective owners** who commit to undertake site assessment, demolition and remediation. As it stood, the statute permitted such arrangements only with owners, so the change smooths the way for prospective purchasers. The prospective owner will also have to sign up under one of the same non-Transfer-Act remediation statutes specified in Section 5.

PA 18-85 Sections 2-4 cover the **"Notice of Activity and Use Limitation"** (NAUL) mechanism originally enacted as Section 33 of PA 13-308. Yes, you read that right – five years ago. Since then, the objective of a notice mechanism less cumbersome than the full Environmental Land Use Restriction has remained elusive.

Connecticut 2018 Environmental Legislative Update: End of Session Wrap-Up Report

Implementation has been dogged by lingering concern about how a use restriction coexists with the rights of prior interest holders that could technically take over a property and not be bound by the restriction. The ELUR mechanism solves that problem by structuring the restriction as a recorded interest in land (easement) in favor of the State, requiring subordination from anyone holding a potentially conflicting interest. But the subordination requirement often impedes site closures that depend on use restrictions to achieve compliance.

The NAUL was originally conceived as a notice device that would not require subordination. Conceptually, where site conditions are less complex, risk could be adequately addressed by simply alerting subsequent owners and occupants to protective use limitations. (The idea wasn't original; EPA Superfund guidance classifies nonproprietary "deed notices" as a distinct category of institutional control.) But this logic did not prevail over concern with potentially conflicting uses. The version now on the books says NAULs are not available at all where a prior interest holder can conduct activity conflicting with the use limitation, or has an interest that allows for intrusion into polluted soil. The ironic result: a mechanism intended to ameliorate the challenge of subordinating prior interests became entirely unavailable when any such interests were present.

The substantive change is in Section 4, which makes the useful incremental improvement of permitting use of an NAUL if every holder of an interest that could interfere with the "conditions or purposes of such notice" agrees by signing the NAUL to "subject" that interest to it. The signing requirement is cross-referenced in Section 3. Section 2 adds a non-substantive cross-reference to the NAUL concept and the minor but important substantive concept that an NAUL may require as well as prohibit activities.

Section 4 makes another helpful change: it eliminates the reference to interests that allow for intrusion into polluted soil. So such interests would not be disqualifying, and would not require clearance by means of the interest holder's signature on the NAUL.

These changes move in the direction of making the NAUL a more useful alternative to the ELUR, though still less than fully self-implementing. If the NAUL is "ELUR Lite," the signing requirement of Sections 3 and 4 is "Subordination Lite." Those who've had difficulty getting subordinations executed may have their own ideas about how easy it'll be to get NAULs autographed.

PA 18-97: Sewage Spill Right-to-Know and Wastewater Treatment Plant Operator Education

This bill combines provisions on POTW operator continuing education and sewage spill reporting. The continuing education requirement (Section 1) expands existing requirements for operator certification. The sewage spill right-to-know provisions (Section 2) also enhance requirements already on the books, but more substantively. The changes include two-hour electronic reporting of spills – to DEEP for "any sewage spill," and to the chief elected official of the local municipality if over 5,000 gallons. The chief elected official has to notify the public and "downstream public officials" – the latter presumably meaning "public officials of

downstream communities" but we suppose both would appreciate a heads-up. The "any sewage spill" threshold for DEEP reporting brings to mind the ancient and venerable spill reporting mantra – "if it's out of the barrel, you should be on the phone." Spill report clearance backlog, anyone? Nothing about what DEEP is supposed to do with the sub-5,000-gallon ones.

PA 18-121: Ninety-Day Permit Turnaround Times for DEEP

DEEP did not like (no, hated) (no, HATED) a provision slipped into a late-session bill last year imposing a 90-day limit on permit processing, and providing that permits not acted on within 90 days would be deemed granted. Amending this provision was a high priority for the Department this session. The result may not have been in accord with DEEP's wish list, but it's an interesting combination of ideas. Section 1 of the Act turns the 90-day limit into a "best efforts to review" within that time "as long as the application is complete." DEEP will be under a firmer limit of 90 days to advise the applicant of any deficiencies in the application. Section 2, added by amendment late in the session, authorizes a pilot program to expedite the issuance of permits. The contours of the program are undefined but one option is sketched out: to expedite processing, the Commissioner "may authorize" up to two LEPs "or other qualified environmental professionals certified by the commissioner as experts on relevant regulations and principles of environmental protection," and the Commissioner "may establish fees" for expedited service. "May" is not "must," and if the Commissioner chooses to implement this option, that certification process will no doubt be interesting.

PA 18-146: Expedited Permitting Procedures for Economic Development

If the 90-day permit turnaround concept was the proverbial blunt instrument, PA 18-146 reflects a more nuanced approach aligned with economic development goals. It requires DEEP to modify permit application forms to allow applicants to request a "preapplication meeting" with DEEP staff "for any permit necessary for the initiation of a new business or new manufacturing production line or the expansion of an existing business." DEEP then will have thirty days to "make reasonable efforts to schedule a meeting," clarify information needed to process the application, and provide an estimate of time to final decision. DEEP will also survey requesting parties to collect information about their experience (customer feedback?), to be included in the Department's annual report to the General Assembly on permitting efforts under Conn. Gen. Stat. §22a-6r.

PA 18-181: Miscellaneous Environmental Bills

Regular readers of these updates are familiar with the late-session phenomenon of the omnibus amendment to a pending bill, either to add unrelated provisions, or to "strike all" original content and substitute something completely different – and like as not, completely unrelated. The leading environmental example this session began as HB 5360 on the singularly modest topics of grass clippings and fallow deer, and in committee picked up provisions about lifetime hunting and fishing licenses and taking of carp by bow and

arrow on the Thames River.

On May 8 – literally on the eve of the session's end – HB 5360 was expanded by a number of provisions including three consequential bills that had already passed the Senate. With grass clippings, bow fishing and so forth remaining as Sections 1 through 4, the final bill added provisions on hunting and fishing topics and acquisition of development rights by the State and municipalities, as well as the three Senate-passed items that became Sections 6, 7 and 8 of the Act. And a potentially significant recycling change brought up the rear as Section 12.

Section 6, concerning **synthetic microfiber pollution from clothing,** started out as SB 341 (File Copy 285; passed Senate with minor amendments before incorporation into PA-18-181). Fans of task forces may rejoice, but quietly: the act provides for creation of a "working group" of clothing industry and environmental stakeholders to develop a consumer awareness and education program. Perhaps because of research documenting detectable quantities of microfibers in unexpected places, clothing manufacturers appear to be all over this. Creepily, so do synthetic clothing microfibers.

PA-181 sections 7 and 8 relate to **climate change.** Which as we know does not exist in Florida.

Section 7, originally SB 343 (File Copy 287), calls for **chemical facilities within areas at high risk** of flooding, severe weather or sea level rise to update hazard mitigation plans (and evacuation plans, if any) to address such risk. The facilities covered are generally those that are already required to make disclosures to local emergency response authorities about hazardous chemicals on premises.

Section 8, originally SB 345 (File Copy 288) addresses **public school instruction on climate change.** As originally proposed, schools would have been required to add this topic to the mandatory science curriculum "consistent with the Next Generation Science Standards." The amended version carried over into PA 18-181 dials this back to provide that science instruction "may include" that topic. The Act makes DEEP available to assist each local or regional school board in curriculum development on the subject – no doubt within available appropriations and in their ample free time.

PA 18-181 Section 12 addresses the problem of glass recycling. Good news: recycling rates are way up. Bad news: a lot of the glass in the single-stream recycling bins gets broken along the way, compromising its viability for recycling and making the rest of the recyclables harder to manage. You know, because there's broken glass in there. Bottle bills are of course a perennial; another proposal in this session covered the options of extending refunds to wine and liquor bottles and setting the refund value at twenty-five cents. The idea that made it across the finish line as Section 12 of 18-181 creates a pilot program to separate glass from the recyclable waste stream. It'll last two years and promote separation both by providing for a separate collection channel and by prohibiting glass in regular recycling. Given the difficulties bedeviling glass recycling, this seems like a first step in a "tactical redeployment" from single-stream orthodoxy.

PULLMAN & COMLEY

Connecticut 2018 Environmental Legislative Update: End of Session Wrap-Up Report

Passed Bills: Other 2018 Environmental

There are no small parts, the saying goes, only small actors. Even when bills address a narrow subject or make a minor change to existing law, there's almost always a serious policy issue or concern lurking in the back story. Anything that makes it across the finish line deserves a mention. Hence the following:

PA 18-54: Removal and Disposal of Abandoned Fishing Gear in Long Island Sound

PA 18-86: Prohibition of Residential Automatic Pesticide Misting Systems

PA 18-101: "Save Our Lakes" License Plates

PA 18-112: Protection of Horseshoe Crabs

PA 18-114: Prohibition on Sale of Red-Eared Sliders and Snapping Turtles

PA 18-118: Renewal of Liability Insurance for Underground Storage Tanks

Notable Also-Rans: Issues, Themes and Challenges Likely to Recur

In any given session, bills on significant issues end up on the cutting room floor. Sometimes that's because they relate to controversial issues on which consensus is lacking. Sometimes they address problems for which solutions are elusive. Sometimes the clock just runs out. The following proposals reflect legislative policy concerns likely to be raised again, in some cases already raised multiple times.

A significant package of brownfield tax incentives came forward as HB 5436 and then, inexplicably, went nowhere. Well, almost – Section 1, concerning tax abatement agreements with prospective purchasers, snuck into the end zone as Section 6 of PA 18-85, discussed above. Section 2 of the House bill outlined an ambitious program of tax credit vouchers, tied to completion of remediation (or phases of remediation), which could be sold, assigned or otherwise transferred. Word is, the Brownfield Working Group was not pleased to leave this one on the field. If any room remains in the state budget for tax relief to foster brownfield development, this concept seems likely to come back.

PULLMAN & COMLEY

Connecticut 2018 Environmental Legislative Update: End of Session Wrap-Up Report

Unilateral DEEP Revocation of Negotiated Consent Orders was the subject of SB 347. The impetus behind this bill was an enforcement dispute in which DEEP asserted and exercised a claimed right to revoke a CO the respondent relied on to define the obligations DEEP claimed were being violated. Much distress ensued among signatories to consent orders, and among environmental lawyers with file cabinets full of the things, who tended to subscribe to the view that negotiated consent orders are tantamount to contracts and should be mutually binding.

The most advanced version of SB 347, File Copy 290, attacked this issue in three ways. First, it would have limited revocation and modification to situations of material breach or material nondisclosure by the respondent. (Revocation and modification by consent are presumably within the customary CO boilerplate.) Second, the Commissioner or a party would be able to seek declaratory or injunctive relief if there was a disagreement about whether such a breach had occurred. Third, these changes would apply only to orders entered after the bill took effect.

Interestingly, this approach didn't address one of the major scenarios put forward – and not just by DEEP – in support of a right of unilateral revocation. Brownfield assistance isn't available when there's an outstanding remediation order on a property. That's as it should be when there's a viable CO signatory – public money shouldn't go to bail them out – but it's a problem when the signatory's nonperforming and defunct. So, the argument goes, the signatory would be in no position to object and DEEP should be able to revoke these "zombie consent orders" unilaterally to make brownfield incentives available to "white knight" third-party redevelopers.

The "material breach" concept would accommodate the viable, performing consent order signatory that gets into a dispute with DEEP. It would also bring the consent order framework conceptually closer to the contract model. When time ran out on the session, all uncalled amendments pending in the Senate tweaked this basic concept; interestingly, none addressed the zombie consent order problem. But of course, with zombies, you never know.

Used Tires present a serious waste management challenge, and one the General Assembly consistently addresses by legislative proposals that consistently fail to get off the ground. The 2018 session presents two facets of the problem: as a matter of waste management, and as a matter of concerns associated with one beneficial reuse option.

Licensing tire haulers and studying beneficial reuse alternatives were the subject to HB 5128. In the version reported out of the Environment Committee as File Copy No. 1, DEEP would have been directed to create a licensing program. It also specified rudimentary details the program must address – including that licensees must "maintain a manifest." (Odd that it's singular; would one be enough?) There would also have been an exemption for persons transporting used tires in the state for "purely personal use" – tire swings, we suppose, but be sure to drill a hole in the bottom.

Connecticut 2018 Environmental Legislative Update: End of Session Wrap-Up Report

Crumb rubber playing fields represent one possible "beneficial reuse" option for tires. But as Sir Isaac Newton may or may not have observed, for every public policy there's an equal and opposite public policy. Thus HB 5188, which proposed a moratorium on use of recycled tire rubber at municipal and public school playgrounds. This has been a regular subject of legislative proposals the last few sessions. As a case study in the tradeoffs of risk-based decisionmaking, a concept we seem to recall hearing about elsewhere, it's worth a slightly deeper dive.

The bill proposed to hold off on installing more crumb rubber fields pending a specific development – completion of an ongoing EPA study on the subject anticipated in mid-2018. Our own DPH has been tracking this issue and says prior studies "do not show an elevated health risk from playing on fields with artificial turf or tire crumbs," but also allows as how "there is still uncertainty … and additional investigation is warranted."

As always, anecdotal evidence can be yours for the Googling, and in the absence of definitive proof of safety, one might think the "precautionary principle" of Eurozone regulatory thinking could tip the balance toward moratorium. Oh, really? We happen to have the Eurozone right here: the European Chemicals Agency last year issued a report on the health effects of crumb rubber fields concluding, in a word, "meh." But ECHA has also acknowledged use of crumb rubber fields for, among other things, "Gaelic sports." So don't discount the influence of the powerful Gaelic sports lobby.

Penalty Relief for First-Time Violations. HB 5266 took another run at an idea embodied in numerous bills last session – excusing business entities from administrative penalties for first-time regulatory violations that are promptly "remediated." "Remediation" obviously means something specific where contaminated soil or groundwater is concerned, but the bill wasn't limited to environmental violations. It would have provided no relief, however, if the violation is willful or grossly negligent, or causes personal injury, or poses a significant environmental or human health threat. Those provisos being virtually certain to precipitate disagreements, the proposal thoughtfully included a right of appeal.

Hydraulic Fracking Waste. In the relatively-high-profile part of the spectrum, SB 103 on fracking waste came out of the Environment Committee as File Copy 12. Since the adoption of PA 14-200, Connecticut's stance on the stuff has been as stated in Conn. Gen. Stat. §22a-472 – ban until DEEP issues regulations for management as hazardous waste. SB 103 originally proposed to take out the "until" and make it a straight ban. FC 12 retained that approach and extended it to natural gas and oil "waste" from natural gas and oil "exploration activities," categories not previously defined or included and at least conceptually disjunct from "fracking waste." The bill had twenty-two cosponsors and the tenor of the written public testimony was predominantly supportive, if not universally so. UConn Law Professor Sara C. Bronin's comments provided additional background and references. And since environmental law is all about acronyms, we are obliged to note that fracking waste from the Marcellus Shale may include "NORM" – no, "Cheers" fans, "naturally occurring radioactive material."

PULLMAN &COMLEY

Connecticut 2018 Environmental Legislative Update: End of Session Wrap-Up Report

The 2018 Bonus Legislative Update of the Year

We all have our quirks, so it's predictable that people we elect to represent us in the General Assembly are sometimes inspired – and even lobbied – to introduce proposals that run to the quirky end of the spectrum. We recognize notable examples as "bonus legislative updates" throughout the session. The end-of-session wrap-up would not be complete without the Bonus Legislative Update of the Year.

The honor goes, hands down, to Section 1 of PA 18-60, which declares September eighth of each year "Cable Technician Recognition Day."

Cable technicians can now proudly take their place alongside people, events and causes on the long and ever-expanding list of commemorative days, weeks and months in Conn. Gen. Stat. §10-29a. These include Leif Erikson Day (within first nine days of October), Corsair Day (May 29, alas about an airplane and not pirates), Connecticut Aviation Pioneer Day (May 25, about Igor Sikorsky, no mention of Gustave Whitehead). To this list is now added the opportunity "to honor cable technicians," which we confess we are less inclined to do when they don't show up on time. In this case, however, there is a special frisson of anticipation in the customary mandate for all such designations that "suitable exercises may be held in the State Capitol and elsewhere as the Governor designates for the observance of the day." Presumably the Governor will be getting right on that: the bill is effective upon passage and September 8 will be here before you know it.