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Other 2014 Environmental and Land Use Legislation: Fracking, Brownfields, State Land Conservation, Private Easements, Wood Burning Furnaces and Running Bamboo

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The General Assembly passed noteworthy bills on six diverse environmental and land use subjects.

Hydraulic Fracturing Waste

A deceptively simple bill concerning hydraulic fracturing waste, PA 14-200, emerged as a synthesis of multiple options presented by competing proposals. Senate Bill 237 would have banned fracking waste outright. House Bill 5308 would have regulated it as hazardous waste. House Bill 5237 proposed to institute a fee on processing, sale, exchange or disposal, presumably on the salutary basis that a new waste stream represents an opportunity to spin off a revenue stream. A fourth, House Bill 5409, would have directed DEEP to "ensure" that transport of fracking waste was "subject to the same rigorous standards and transparencies governing the transport and handling of all hazardous waste," and to study and provide a report to the General Assembly assessing such waste and recommending handling standards.

The solution that emerged was a heavily amended version of the fourth option. PA 14-200 provides that no person may accept, receive, store, treat, transfer or dispose of fracking waste, including by discharging it into a pollution abatement facility, until DEEP adopts regulations on the subject. The regulations must first address the State's incorporation, under its delegated RCRA authority, of 40 CFR §261.4(b)(5), which exempts "drilling fluids" associated with oil and gas exploration from the definition of "hazardous waste," and classify these materials as state-regulated waste. The regulations must also ensure that radioactive constituents in fracking waste do not pose a hazard, and require disclosure of the composition of such waste. Once the regulations are duly adopted, "no person shall" collect, store, etc., without a permit to do so.

Several interesting wrinkles emerged in the final bill. One is a prohibition on use of fracking waste for de-icing or dust suppression until regulations are promulgated defining conditions DEEP deems appropriate to protect human health and the environment. In support of this authority, the Act also authorizes DEEP to request information concerning the provenance and composition of de-icing or dust suppression materials; failure to provide such information provides a basis for DEEP to prohibit the material or decline to issue regulations for

its use.

Perhaps most intriguing is a provision authorizing pilot projects for treatment of fracking waste. The Act authorizes DEEP to approve up to three requests by "professionally qualified" persons to treat up to 330 gallons of waste for research purposes. For purposes of this provision only, the Act deems fracking waste to be state-regulated hazardous waste notwithstanding the Federal exemption or the lack of regulations defining classification under state law.

The proliferation of competing options in the early phases of the session mirrors the "state of play" in environmental policy on hydraulic fracturing in general and the management of resulting wastes in particular. Oil and gas interests protest that drilling wastes have been around for decades and the RCRA exemption rightly treats them as nonhazardous. Whatever the merits of this position, recent controversy has made hydraulic fracturing a red-flag topic. PA 14-200 defers ultimate questions pending further study, while seeming to require that any solution include rejection of the federal drilling fluid exemption and at least some level of state classification as hazardous material.

Brownfield Remediation and Development

PA 14-88 makes modest but useful changes to laws concerning contaminated properties, most notably the following:

- Section 1 of the Act extends the "interim verification" option, previously made available to Transfer Act sites, see Conn. Gen. Stat. § 22a-134(28), to sites under the voluntary cleanup program. Under the voluntary program as under the Transfer Act, "interim verification" is a written opinion by a Licensed Environmental Professional that the parcel has been investigated, that remediation is complete but groundwater remediation standards have not yet been met, and that a long-term remedy is being implemented to achieve groundwater compliance with a projected duration and a defined operation and maintenance (O&M) plan. The "applicant" under the voluntary program is obligated to continue groundwater remedy O&M, prevent exposure to the groundwater plume, and submit annual status reports.
- Section 3 of the Act amends the Transfer Act to provide that hazardous waste generated in connection with "removal or abatement of building materials" does not count toward the 100 kilogram per month "establishment" threshold.
- Section 4 makes three minor changes to the Transfer Act's provisions concerning interim verifications.

1. Amends Conn. Gen. Stat. §22a-134a(g)(2)(A) to provide that "interim" verifications can be submitted for a portion of a property, as was already permitted for verifications.

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2. Adds new Section 22a-134a(g)(2)(B) that gives each filer of interim verifications until September 1, 2015, to record an environmental land use restrictions (ELUR) , but invalidates any interim verification for which no ELUR is filed by that time.
3. Specifies that DEEP's audit power extends to interim verifications.

Disposition of State Property

Public Act 14-169 earns the distinction of being notable as much for what it does not do as for what it does.

As passed, this bill gives the Commissioner of the Department of Energy and Environmental Protection two new powers with respect to DEEP-owned lands: to designate them as "lands of public use and benefit," and to place conservation or preservation easements on them. "Public use and benefit" includes conservation, public enjoyment and recreation.

The bill also mandates creation of a publicly accessible database containing a public use and benefit land registry for lands owned by DEEP, other state agencies, municipalities, land conservation organizations, and state-owned water supply land. The database is to be available by January 1, 2015 and updated quarterly thereafter. It will include information on location, ownership, use and level of protection, data sheets including deeds and easements, and management or stewardship plans.

Finally, the bill authorizes the Commissioner of the Department of Agriculture to place conservation or preservation restrictions on land owned by that department.

The Act bears little resemblance to the version originally proposed and supported by numerous testifying witnesses. Senate Bill 70 would have deemed all properties held by DEEP and the Department of Agriculture as "lands of high conservation value," and would have required the Commissioners to make written findings to justify exemptions for individual properties. It would have mandated preservation of such land as "open space and in a natural and scenic condition," and required conservation easements in deeds. It would also have subjected any transfer of such lands to onerous certification and review restrictions – including review and approval by the General Assembly's Environment Committee.

Testimony on the initial version of the bill postured it as a reaction to the "Haddam land swap" controversy, which involved a proposal for the state to give a developer a parcel of state-owned land on the Connecticut River in exchange for the developer's larger, wooded but upland parcel. Sponsors and supporting witnesses, referring repeatedly to this experience, plainly intended to put DEEP on a very short leash. An interim version of the bill lengthened the leash only modestly, substituting the "lands of public use and benefit" concept and removing the notion of automatically placing all property in a protected classification, but retaining provision for General Assembly review of conveyances.

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In its final form, the Act takes only modest steps to address conservation of state-owned lands. DEEP will have the option, but no obligation, to designate "lands of public use and benefit." The only apparent effect of the designation has to do with classification in the registry. Even for this purpose, it seems to have limited effect. The registry is not limited to designated lands; indeed, because it includes lands held by owners other than DEEP, it will include lands that are not even eligible for designation. The Act's endorsement of the Commissioner's power to place conservation or preservation easements on any DEEP-owned land apparently does resolve doubt on that score, but without compelling any action. What remains is a registry concept that will serve as a public information tool. Controversies over transfers of state property are tacitly committed to the political process in which the Haddam land swap proposal played out.

Maintenance of Private Easements and Rights of Way.

Public Act 14-67 attempts to address the problem of allocating responsibility for maintaining private easements and rights of way on residential property. It provides that the owner of property benefited by the easement or right of way "shall be responsible" for the cost of maintenance and repair including snow removal.

A common problem in such situations is sharing maintenance costs among multiple properties that benefit from an easement or right of way. PA 14-67 provides that in such situations, absent agreement, costs "shall be shared … in proportion to the benefit received by each such property." This formulation is logical, but allocating the "proportion" of benefit may present practical difficulties. The Act creates a right of action for specific performance or contribution if the owner of a benefited property fails to pay the "proportional" share after written demand to do so.

Outdoor Wood Burning Furnaces.

Public Act 14-92 amends Conn. Gen. Stat. §22a-174k to remove a condition tied to adoption of federal standards for outdoor wood-burning furnaces. The statute had provided that its terms applied until federal standards were adopted. The amendment makes the state standards independent of federal rulemaking and thus permanent as a matter of state law.

The Act also clarifies that no person may burn anything in any outdoor wood-burning furnace other than wood that is not chemically treated. This clarification restates the concept as a free-standing prohibition rather than one of several provisos concerning operation – evidently to mesh better with an enforcement provision that allows for fines of up to $90 per infraction. Although bills on such furnaces have been a regular feature of the last few sessions, the effect of this one is limited; in its bill analysis, the Office of Legislative Research put the anticipated revenue effect at $450 annually, estimating something like five violations per year.

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Running Bamboo

Public Act 14-100 returns to a subject addressed last year by PA 13-82, which imposed restrictions on planting and selling "yellow groove" bamboo, a species that spreads readily and is difficult to eradicate once established. On the evidence of committee testimony this year and last, it is a plant with few endearing qualities and fewer friends. The bill passed this year made several important changes to the strictures enacted last year.

- It modifies the buffer zone provision in three distinct respects.

1. It reduces the minimum distance from planting site to property boundary to forty feet (versus one hundred). But ...
2. It eliminates an exception from the buffer zone for plants "contained by a properly constructed and maintained barrier system." And ...
3. It deletes a provision that "grandfathered" bamboo planted before October 1, 2013, the effective date of PA 13-82.

- It provides that allowing running bamboo to grow beyond the boundaries of a property "shall be deemed to be a nuisance."

The cumulative effect of these changes is that yellow groove bamboo must remain within a forty-foot buffer zone, regardless of when it was planted or whether the owner has taken steps to "contain" it. Violation of these modified restrictions will be subject to enforcement by DEEP or municipal authorities. And if these measures fail, the remedies available under the common law of nuisance are available to affected property owners.

This Alert is part of Pullman & Comley's report on environmental legislation in the 2014 session of the Connecticut General Assembly. The main article in this report can be found here.

Attorney Christopher P. McCormack, based in the Bridgeport office of Pullman & Comley, practices in the areas of environmental law and litigation. He is the Vice Chair and Legislative Liaison for the Environmental Section of the Connecticut Bar Association.