

2019 Connecticut Environmental Legislative Update No. 2

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Welcome to our Environmental Legislative Updates.

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.

You can tell it’s the early part of the session when the subject matter of the daily bill reports runs somewhere between stream of consciousness and full-blown ADD – a grab bag of shiny objects that someone, somewhere, thought might benefit from legislative attention. For many of these ideas, introducing the bill is enough to satisfy the urge; the first we hear of them is also the last. But we never know what will take off, or what might be of interest for reasons we’re not aware of. So here we go, and if this all seems kind of scattershot, it’s the hand we’ve been dealt.

We’ll start with one topic that actually calls for an extended introduction: unilateral DEEP revocation of consent orders. In fact, we’ll take the trouble to embed a hyperlink to HB 5185.

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As regular readers of these updates know, DEEP unilaterally terminated a consent order a couple years ago in the middle of a dispute about the respondent's performance. (If those closest to the details feel this summary does neither side justice, good – we are resolutely trying to decouple this issue from the merits of that case.) Legislation has been proposed for several sessions in a row, always with DEEP opposition, to permit termination only with the consent of the respondent.

The objection to a right of unilateral termination is that it allows DEEP to take its marbles and go home if a dispute arises. This is problematic for respondents, who often swap material concessions for “peace” in the form of settled and predictable consent order obligations. Unilateral revocation doesn't restore the status quo ante. If one views negotiated consent orders as tantamount to contractual commitments, which many courts have done, this looks and feels unfair.

DEEP feels it needs to be able to withdraw from a consent decree when a respondent invokes it to stop DEEP from taking action DEEP considers necessary to protect human health and the environment. Fair enough – although boilerplate CO language says DEEP retains the right to issue other and further orders if actions under this CO aren't protective. This would seem to cover situations that call for more than what the CO requires – not where CO requirements are sufficient but DEEP doesn't feel the respondent is living up to them. In the latter situation, too, DEEP's options include an action to enforce the agreed terms of the CO, which would put a dispute before a neutral factfinder.

That's the core of the controversy as it's customarily viewed. The obvious solution – as reflected in HB 5185 – is to require the consent of the respondent to, in effect, dissolve the contract. But that approach fails to address an important scenario where a unilateral right of termination makes sense.

A remediation consent order signatory may go belly up without completing its obligations. Now we have a brownfield problem, and we'd want to provide brownfield incentives to someone who volunteers to redevelop it. But some brownfield assistance is unavailable when there's an outstanding consent order. So, it's argued – and not just by DEEP – that we need to be able to clear out old consent orders that serve only to impede redevelopment. Since the defunct signatory isn't around to consent to termination, the only way to get these “zombie consent orders” out of the way is to allow for unilateral termination by the counterparty.

HB 5185 doesn't address this scenario. Interestingly, neither did the bill on this subject in the 2018 session that got as far as the file copy stage but otherwise just elaborated on the procedures by which DEEP and consent order signatories could litigate their differences. In other news, some other perennials and some new twists on old issues.

Fracking waste: HB 5244 proposes to expand the existing ban to include all gas and oil extraction wastes and brines. PA 14-200 prohibited fracking waste pending issuance of regulations governing its handling, which DEEP was to have proposed no later than July 1, 2018. No regulations have been proposed, so the ban remains.

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If the disposable straw is the current *bête noire* of plastic waste, HB 5245 reads like the Greatest Hits list – it proposes to ban not only plastic straws, but also plastic stirrers, polystyrene packaging, helium balloons, single use plastic bags and “products that contain microplastics.” Will no one speak for the stirrers? Benjamin Braddock might get different advice today.

HB 5247 would require “all state and municipal developers and any company with a construction project” to employ stormwater best management practices. Don’t we kind of already do that?

Artificial turf: HB 5249 would prohibit state or municipal purchase.

We’ve already mentioned HB 5024 to restrict use of wild and exotic animals in circuses and other traveling shows. HB 5248 would address the same subject by an outright prohibition. Whether it’s a coincidence or not, today’s batch includes a cluster of bills around trade in animals. HB 5246 would prohibit the sale of dogs, cats and rabbits at pet shops. (What’s left? Snakes and mice might be a good combination – repeat business, you know.) HB 5250 would prohibit “wildlife trafficking,” i.e. sale or purchase of products and parts such as ivory and shark fins. HB 5251: same for shark fins specifically. And HB 5252 would prohibit the sale of cetaceans – anywhere, not just in pet shops.

How about a grant program to help municipalities with the cost of removing trees damaged by the emerald ash borer? HB 5253 says that would be nice.

A repeat from last session: HB 5254 to establish a pilot program authorizing towns to impose a buyer’s conveyance fee to fund open space acquisitions.

More in the land use end of the spectrum, but rather intriguing: HB 5273 proposes to establish “as of right” multifamily zones within a half-mile radius of “fixed route transit stops.”

Labeling for “consumer products” containing GMOs: HB 5278. Which would be what? Presumably not those covered by the federal rule for GMO – excuse us, “bioengineered” – foods, which pre-empts inconsistent state requirements. Industrial hemp, maybe.

Not necessarily environmental, but HB 5280 proposes to study the effects of chemical road treatments for ice removal and evaluate alternatives.

Last but not least, the Legislative Liaison was mortified to discover that a production error resulted in omission of the Bonus Legislative Update from our first missive of the session. The staff responsible has received a stern talking-to and assures us that this sort of thing is relatively unlikely to happen again, for the most part.

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Among many worthy contenders, the clear choice for first Bonus Legislative Update of the 2019 session has to be HB 5061 concerning driving in the extreme left lane. If ever it could be said that “there oughta be a law,” this is it – although we thought there already was. What part of “keep right except to pass” doesn’t the driver in front of us on the Parkway for forty miles understand?

As usual, comments, questions, corrections and complaints are welcome. Best regards to all.

- cpm.

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