

## **Please OPPOSE SB 362, AAC Riverfront Protection**

**SB 362 greatly expands the jurisdiction of municipal inland wetlands and watercourses commissions in both geographic extent and the reasons they can use to deny activity and overturns decades of administrative law.**

**SB 362 authorizes local inland wetland commissions to prohibit most human activity 100' on both sides of all "rivers."** While it is unclear what "river" means, advocates state it should apply to every permanently flowing channel of water. Proponents have said that SB 362 could prevent lawns, landscaping, sheds, decks, even swing sets, if a local wetland commission wanted to do so. This wasn't changed by the committee's amendment. How much property value (and tax revenue) will be lost by implementing these new restrictions?

**Proponents argue that this new area is just a regulated area and not "off limits" but under current law** wetlands and watercourses are virtually "off limits" because almost all local wetland commissions treat them that way, even though, legally, activity is just "subject to regulation." The 200' riverfront area in this bill would be treated the same – it is made equivalent to wetlands and watercourses and becomes a third protected resource under the act.

**This bill is NOT the same as upland review areas under current law.** Under current law, an applicant can conduct activity in the upland review area (called buffer areas prior to 1996) if the activity will have no adverse impact to a watercourse. But SB 362 authorizes denial of activity if there's any adverse impact to the 200' upland corridor itself.

**SB 362 adds additional grounds to current law to deny activity in this upland corridor** – e.g., if there is any adverse impact to wildlife habitat within the 200' upland corridor, human activity can be prevented. This is an impossible hurdle to overcome (all land is habitat for some wildlife) and amounts to a statutory repeal of the 2003 Avalon Bay v. Wilton Supreme Court decision on salamanders and a reversal of the legislative compromise adopted in 2004 on this issue.

**Existing wetland and watercourse law is very protective of streams and rivers. This bill is simply not necessary.** The current inland wetlands and watercourses act mandates a very difficult permitting standard on most human activity. Under current law, an applicant for any regulated activity anywhere (not just upland review areas) must prove with expert testimony that their activity will have no adverse impact on any wetland or watercourse. UConn has recently confirmed this through a study of 167 watershed areas covering virtually all of the 4 southern counties. UConn's conclusion: "These analyses appear to present strong evidence that the wetlands and watercourse regulations in Connecticut are having a measurable effect in protecting riparian areas." UConn's mapping shows no net loss of wetlands since at least 1985.

**The bill does not apply to lakes and ponds because property owners around lakes and ponds would be too upset.** While lake owners are more organized through lake associations than riverside owners, river and stream owners will be no less upset at this government limitation on the use of their land. Why apply different standards to these owners?

**Proponents hold out Massachusetts as doing this and that they go 200' on both sides of rivers.** But Massachusetts reduces their buffer area to 25' in urban areas. A 200' buffer next to the Conn. River, as shown in a widely distributed photo to promote the bill, would have a far different perspective if the buffer was shown next to only a 5' wide stream. Moreover, Massachusetts may not be a state to follow: CT is 48<sup>th</sup> in the nation for housing production per capita. Massachusetts is one of the 2 states behind us.

**See also on the reverse our statement on evidentiary standards for why a "preponderance of the evidence" rule should not be included in the IWWA.**

**Inserting a “preponderance of the evidence” rule in the IWWA flies in the face of long standing “substantial evidence” rules and turns decades of administrative law on its head.**

Both these bills require that applicants prove by a preponderance of the evidence before the local wetland commission that they are entitled to a permit. This makes no sense in an agency permit application and conflicts with the “substantial evidence” rule courts have long applied to appeals of agency decisions. It will generate years, if not decades, of litigation to sort out.

**Black’s Law Dictionary would have to be rewritten if either SB 362 or HB 5603 becomes law.**

Black’s Law Dictionary describes the substantial evidence rule as “that quality of evidence necessary for a court to affirm a decision of an administrative board. [A] reviewing court will defer to an agency determination so long as, upon an examination of the whole record, there is substantial evidence upon which the agency could reasonably base its decision.” On the other hand, the preponderance of the evidence standard that is added by this legislation is defined by Black’s Law Dictionary as, “Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it.” It is a standard applied in most civil actions, but not to record appeals of agency decisions.

**Lay agency members are not equipped to weigh the preponderance of the evidence standard used in civil actions.**

There is no oversight by a judge on what evidence is admitted into the record (everything is admitted) and no jury instructions are provided by a judge to agency members to help guide their decision. Courts have for decades applied a substantial evidence rule in wetlands appeals (and in most appeals of other agency decisions). Contrary to the Environment Committee debate, which entirely missed the mark in its comparison of evidentiary standards of proof, the courts use the substantial evidence rule not as the burden that the applicant must meet before a commission, but as the level of evidence a local wetland commission must meet to uphold its decision on appeal.

**The poorly drafted, simplistic addition of the preponderance of the evidence standard is intended to ratchet up the standard of proof on applicants, but could likely inadvertently subject local commissions to changes in their burden to justify decisions. This has not been well thought out and is filled with unintended consequences.**

When a wetland commission grants or denies a permit under current law, courts will uphold the decision if there is substantial evidence in the record to justify the decision. The courts have said that “determining what constitutes an adverse impact on a wetland is a technically complex issue.” River Bend Associates v. Conservation and Inland Wetlands Commission, 269 Conn. 57, 78 (2004). “[Our] case law is clear that in determining what constitutes an adverse impact on a wetland, expert testimony is essential.” Toll Brothers, Inc. v. Bethel Inland Wetlands Commission, \_\_\_ Conn. Supp. \_\_\_ (2006), citing to River Bend Associates at 78. “The character of the evidence cannot be speculative but must be specific to the particular site.” River Bend Associates at 79, n.28. “In the absence of such testimony from an expert and in the face of contrary evidence, an administrative agency may not draw an inference which undermines the contrary evidence or the contrary expert’s conclusions.” Toll Brothers, Inc.

**In these and other recent cases, the local commissions lost because they denied permits in the face of expert evidence that proved no adverse impact to wetlands or watercourses and without any contrary evidence that met the court’s substantial evidence standard.** The case law is clear on these evidentiary standards, and SB 362 and HB 5603 are about environmental advocates not being happy with the results in these wetlands appeals.

**Decades of new litigation will be the result to sort out how a “preponderance of the evidence” rule is to be applied in appeals of agency permit decisions.**