

## Journey to the Legal Horizon

### What to do while applications are hibernating

*Tom O'Dell asked me to write a column on what wetlands agencies could be doing while awaiting the return of "business as usual." In this column I share two thoughts: one task for the present and planning for the future.*

#### Part I

If your wetlands agency has not amended its regulations for a while or if you're just not sure if your agency has kept its regulations current with state law, start with task. There are a few tools that will really streamline this job. Depending on the size of your agency, you could consider setting up a smaller group to meet on these issues. Of course, the meetings would need to be noticed according to the Freedom of Information Act, be held in a public place (i.e., not in someone's home), be open to the public, have minutes created, etc. The major tool to rely on is the 2006 version of the DEP Model Regulations. The model regulations are available on the DEP website at:

[http://www.ct.gov/dep/lib/dep/water\\_inland/wetlands/modelregsfinalof4thedition.pdf](http://www.ct.gov/dep/lib/dep/water_inland/wetlands/modelregsfinalof4thedition.pdf). The regulations begin with a list of revisions on pages 2 through 6. The list also includes the reason for the change in very succinct language. This will come in handy when you need to state on the record during the public hearing the reason for the proposed changes. The revisions clarify prior regulations, or are mandated by an amendment to the state law. Within the 2006 model regulations themselves it is very easy to distinguish the changes, as new or revised language is underlined. I have been before too many agencies in the past six months with outdated regulations. Here are some of the procedural and substantive problems in some towns' existing regulations.

*Date of receipt:* The law no longer allows you to require submission three business days prior to the next regularly scheduled meeting. The date of receipt is now the day of the next regularly scheduled meeting *immediately following the day of submission*.

*Regulated activity:* The Appellate Court in 2003 ruled that in order to have authority regulate activities that take place outside of wetlands or watercourses for their effect on those resources the agency must first have adopted a regulation establishing the authority to regulate conduct in the upland. The DEP has proposed language to establish that authority. Check the definition section of the model regulations, § 2.1. If you're fuzzy on the legal reasoning of that case, you can read my blog entry of December 28, 2009 addressing the case, at [www.ctwetlandslaw.com](http://www.ctwetlandslaw.com).

*Aquatic, plant or animal life and habitats in wetlands or watercourses:* Maybe some agencies have had a lot of turnover since 2003 and don't remember the outcry when the Supreme Court held that wildlife did not fall within the protection of the wetlands act. Then the legislature amended the statute in 2004, upholding the Supreme Court decision in part and reversing it in part. You will not be able to properly figure out what to do with wildlife considerations without the statutory language in your regulations. It is not intuitive; it was a political compromise. You will need to have the language as you review applications and decide how to consider wildlife impacts. Want to brush up on the wildlife controversy? You can read my blog entries of December 30, 2009 and December 31, 2009 at [www.ctwetlandslaw.com](http://www.ctwetlandslaw.com).

*Right of agency to enter onto private property:* In prior versions of the DEP model regulations, there seems to have been language that suggested that agencies or their agent had the authority to enter onto private property without the consent of the property owner. The 2006 version clears up that misnomer.

To complete the tasks, the DEP has made available online all of the legislative advisories. From the DEP Inland Wetlands and Watercourses main page, click on "Legislation, Regulation and Case Law." You would only need to review the advisories from 2006 to the present, as the earlier advisories are already incorporated into the 2006 model regulations.

I note that DEP has not posted an advisory for the legislative change in the 2009 session. Last year the legislature amended the act to state that wetlands permits issued from July 1, 2006 to July 1, 2009 "shall expire not less than six years after the date of such approval" and that the total period of time such permit may be in existence, including renewal time, cannot exceed 11 years. To read more about the change, go to the January 26, 2010 entry on my blog at [www.ctwetlandslaw.com](http://www.ctwetlandslaw.com).

One more task derived from your regulations: Almost all agencies have a section equivalent to § 4.4 in the model regulations which requires any person wishing to engage in an exempt activity to notify the agency "on a form provided by it." It is the rare agency that has developed that form. Some agencies invite letters with supporting documentation. Some use the application for regulated activities -- which makes me shriek, because it prompts the agency to begin an inappropriate inquiry. The application form for regulated activities delves into areas that are irrelevant to an agency's consideration of *whether* it has jurisdiction. Once an agency has established its jurisdiction, it is appropriate to look into alternatives and other factors for consideration. Why not craft a form which asks for facts that establish whether or not the person's activities fall within the exemption?

## Part II

Training of individual agency members, on the one hand, is a personal matter. A member is asked to give up time from other personal or family responsibilities or pleasures to become and to stay an informed member. But it is also an agency concern, as well as a public one. The wetlands act requires at least one member of the agency or staff to have completed the DEP comprehensive training program. DEP is required to allow one person from each town to attend the entire training program at no cost. Of course, the notion that only one person be trained is an inadequate benchmark. It is merely a point of departure.

Training should not be a matter that occurs if agency members happen to sign up and attend.

**Priority #1: The training of members within a calendar year should be a matter of business to be discussed early in the year.**

I believe it should be placed on the agenda once a year to discuss the year's goals for training agency members. The discussion can establish who has completed what aspects of existing training. Are members feeling overcommitted time-wise between training and agency duties?

An idea that was discussed at the January, 2010 Council on Environmental Quality meeting was to excuse members from attending an agency meeting, as long as the agency would still have a quorum to proceed with pending business, so that the member could spend the equivalent time in training.

**Priority #2:** *Any* member who has not attended Segment I and the basic legal training should strive to do so. When I routinely offered Segment I legal training while at the Attorney General's Office, I often had agency staff people with many years of experience state that they learned something new at Segment I.

**Priority #3:** A *majority* of agency members should strive to attend the DEP Segment II Legal Update or the CACIWC annual meeting workshop on Legal Update. In fact, your agency should try to be in attendance at both. (Different members could go.) The DEP's Segment II is generally in May and June, while the CACIWC meeting is in November. This year almost all of the Appellate and Supreme Court cases covered in the CACIWC annual meeting workshop had been issued in the late summer and fall, too late to be covered in the DEP Segment II training.

And, yes, I agree that folks should go get the technical training as well. I just want to stress the need for the agency to stay up to date on the changes in the law. That will not happen merely by serving on a commission for twenty years. It is not a matter of experience; it is a matter of knowledge.

**Priority #4:** The statute requires the follow-up step that the newly trained member summarize the content of the training program at an agency meeting. At a minimum that should include distribution of any written materials provided at training.

Up to date regulations and forms and current knowledge of the law are the best bases for being prepared for the return to "business as usual."

Attorney Janet P. Brooks

Janet is in solo practice in East Berlin and has started a blog on wetlands law, which you can read at [www.ctwetlandslaw.com](http://www.ctwetlandslaw.com).