

RICHARD BLUMENTHAL
ATTORNEY GENERAL



55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

(860) 808-5318

Office of The Attorney General
State of Connecticut

February 14, 2002

William O'Beirne
NOAA/Office of Ocean and Coastal Resource Management
Coastal Programs Division
SSMC-4, N/ORM3
1305 East-West Highway
Silver Spring, MD 20910

Melville Cote
U.S. Environmental Protection Agency, Region I
John F. Kennedy Federal Building
Boston, MA 02203

**Re: *Certification of the State of Connecticut re Implementation Authority,
Marina Stormwater Runoff, Animal and Nutrient Management,
and Chemical Control***

Dear Messrs. O'Beirne and Cote:

Enclosed please find my certification as Attorney General of the State of Connecticut that the state's Department of Environmental Protection (DEP) possesses adequate regulatory authority to implement the required management measures for the section 6217 program. The appended certifications cover the topics of: 1) chemical control at construction sites, roads, highway, bridge projects and dams; 2) confined animal facilities and nutrient management; and 3) marina stormwater management. I conclude that the DEP, through existing statutory authority and existing programs, in conjunction with other authorities and management programs mandated by Connecticut law, has the authority to prevent nonpoint source pollution and implement the new management measures.

Very truly yours,

A handwritten signature in black ink, appearing to read "Richard Blumenthal".

Richard Blumenthal
Attorney General

RB/dhw: mt

c: Arthur J. Rocque, Jr., Commissioner of Environmental Protection
Robert Smith, Chief, DEP Bureau of Water Management
Charles Evans, Director, DEP Office of Long Island Sound Programs
Kimberly P. Massicotte, Assistant Attorney General

CERTIFICATION OF THE ATTORNEY GENERAL OF THE STATE OF CONNECTICUT

I hereby certify that there exists adequate legal authority within the State of Connecticut for the implementation and enforcement of the agriculture management measures for confined animal facilities (both large and small units)¹ and for nutrient management,² as applicable for the management area identified pursuant to Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990. 16 U.S.C. § 1455b, P.L. No. 101508. The authority of the State of Connecticut to enforce the nonpoint source provisions of Section 6217 rests chiefly with the state's Department of Environmental Protection (DEP), through its water pollution control statutes, and secondarily with municipal regulation of development proposals. The existence of certain additional state and municipal programs, such as zoning authority and coastal zone management, provides further assurance that the management measures for confined animal facilities and nutrient management can be implemented and enforced where necessary, and these legal mechanisms are detailed in the following discussion.

I. DIRECT REGULATORY AUTHORITY OF THE COMMISSIONER OF ENVIRONMENTAL PROTECTION

The Commissioner possesses program-specific authority to regulate runoff from confined animal facilities and the application of nutrients to agricultural lands. This primary authority is contained in the state's water pollution control statutes and in its water quality standards that apply throughout the state.

¹ The management measure for facility wastewater and runoff from confined animal facility management requires that the discharge from the confined animal facility to surface waters be limited, first, by storing both the facility wastewater and the runoff from confined animal facilities that is caused by storms up to and including a 25-year, 24-hour frequency storm. Storage structures should: (a) have an earthen lining or plastic membrane lining, or (b) be constructed with concrete, or (c) be a storage tank. Secondly, discharges from these facilities should be limited by managing stored runoff and accumulated solids from the facility through an appropriate waste utilization system. The management measure for facility wastewater and runoff from confined animal facility management (small units) calls for the design and implementation of systems that collect solids, reduce contaminant concentrations, and reduce runoff in order to minimize the discharge of contaminants both in facility wastewater and in runoff that is caused by storms up to and including a 25-year, 24-hour frequency storm. These systems should be implemented so as to substantially reduce significant increases in pollutant loadings to ground water. Stored runoff and accumulated solids from the facility should be managed through an appropriate waste utilization system.

² The nutrient management measure calls for the development, implementation, and periodic revision of nutrient management plans with the goal of (1) applying nutrients at rates necessary to achieve realistic crop yields, (2) improving the timing of nutrient application, and (3) utilizing agronomic crop production technology so as to increase nutrient use efficiency. When the nutrient loading is from a source other than the application of commercial fertilizer, one must determine the nutrient value and the rate of availability of the nutrients, and determine and credit the nitrogen contribution of any legume crop. Soil and plant tissue testing should be used routinely. Nutrient management plans contain the following core components: (1) farm and field maps depicting acreage, crops, soils, and waterbodies; (2) realistic yield expectations for the crop(s) to be grown; (3) a summary of the nutrient resources available to the producer, including soil tests for pH, phosphorus, nitrogen, and potassium and nutrient analysis of manure; (4) an evaluation of field limitations based on environmental hazards or concerns, such as agricultural lands near surface waters; (5) the use of the limiting nutrient concept to establish the mix of nutrient sources and requirements for the crop based on a realistic yield expectation; (6) identification of timing and application methods for nutrients in order to provide nutrients at rates necessary to achieve realistic crop yields and reduce losses to the environment; and (7) provisions for the proper calibration and operation of any nutrient application equipment.

A. Connecticut's Water Pollution Control Act

The primary program-specific authority delegated to the Commissioner by Connecticut's General Assembly is the regulation of water pollution within the state. Chapter 446k of the General Statutes, Conn. Gen. Stat. § 22a-416 *et seq.*, constitutes a broad delegation of authority to abate pollution of the waters of the state, consistent with the legislature's declaration of policy that "the pollution of the waters of the state is inimical to the public health, safety and welfare of the inhabitants of the state, is a public nuisance and is harmful to wildlife, fish and aquatic life and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water," and that "the elimination of pollution is hereby declared as a matter of legislative determination." Conn. Gen. Stat. § 22a-422.

Pollution, broadly defined for the purposes of this delegation and mandate, is any "harmful thermal effect or the contamination or rendering unclean or impure or prejudicial to public health of any waters of the state by reason of any wastes or other material discharged or deposited therein by any public or private sewer or otherwise so as directly or indirectly to come in contact with any waters." The term "rendering unclean or impure" means "any alteration of the physical, chemical or biological properties of any of the waters of the state, including, but not limited to, change in odor, color, turbidity or taste." The term "waters" includes "all tidal waters, harbors, estuaries, rivers, brooks, watercourses, waterways. . . and all other surface . . . bodies or accumulations of water, natural or artificial, public or private, which are contained within, flow through or border upon this state or any portion thereof[.]" The term "wastes" includes "sewage or any substance, liquid, gaseous, solid or radioactive, which may pollute or tend to pollute any of the waters of the state." Conn. Gen. Stat. § 22a-423, *q.v.* "pollution"; "rendering unclean or impure"; "waters"; "wastes."

The Commissioner is specifically empowered to "develop comprehensive programs for the prevention, control and abatement of new or existing pollution of the waters of the state"; "to advise, consult and cooperate with other agencies of the state, the federal government . . . and with . . . political subdivisions . . . in furtherance of the purposes of this chapter"; "to encourage, participate in or conduct studies, investigations, research and demonstrations, and collect and disseminate information, relating to water pollution and the causes, prevention, control and abatement thereof"; "to issue, modify or revoke orders prohibiting or abating pollution of the waters of the state, . . . or adopting such other remedial measures as are necessary to prevent, control or abate pollution"; "to issue, continue in effect, revoke, transfer, modify or deny permits . . . for the discharge of any water, substance or material into the waters of the state . . ."; "to adopt regulations . . . to implement this chapter . . ."; and "to exercise all incidental powers necessary to carry out the purposes of this chapter and the federal Water Pollution Control Act." Conn. Gen. Stat. §§ 22a-424 (b), (c), (e), (f), (i), (1), and (k).

No person or municipality may cause pollution of any of the waters of the state or maintain an unpermitted discharge of any treated or untreated wastes.³ The Commissioner has the authority to

³ No person or municipality shall cause pollution of any of the waters of the state or maintain a discharge of any treated or untreated wastes in violation of any provision of [Conn. Gen. Stat. Chapter 446k, Water Pollution Control]. Conn. Gen. Stat. § 22a-427. The Commissioner is specifically authorized to identify not only persons or municipalities that are causes of pollution to the waters of the state, but also to identify so-called "community pollution problems" and order their abatement. Conn. Gen. Stat. § 22a-428.

regulate all discharges of “water, substance or material into the waters of the state . . .,”⁴ and possesses the authority to seek enforcement with respect to violations of any permitted or unpermitted discharge, by administrative order or by referral to the Attorney General for appropriate legal action. Conn. Gen. Stat. § 22a-430(d).

In the event that polluted runoff is or could potentially be discharged to any waters of the state from confined animal facilities (either large units or small units) or from agricultural lands after the application of nutrients, the Commissioner of DEP has authority pursuant to this statute to enforce against anyone creating or maintaining that discharge or a potential discharge, and to enjoin the activity. The Commissioner can invoke this authority to order the abatement of any actual or potential source of pollution, as when a condition is created or maintained at a confined animal facility or upon any agricultural land that causes or has the potential to cause pollution to the waters of the state. The Commissioner may also proceed against the property owner where the actual or potential polluting discharge to the waters of the state is being created or maintained by one other than the property owner. Conn. Gen. Stat. §§ 22a-432; 22a-433.⁵

In issuing an order to abate or prevent nonpoint source pollution from confined animal facilities or agricultural lands, the Commissioner can require whatever steps are necessary to abate an existing discharge or correct a potential source of pollution. These steps can include requirements that wastewater and runoff from confined animal facilities be stored in storage tanks, concrete structures or structures having an earthen or plastic membrane lining; requirements that runoff and accumulated solids from confined animal facilities be managed through an appropriate waste utilization system; and the development, implementation and periodic revision of nutrient management plans. An order to abate or prevent pollution could also include a time schedule for the accomplishment of the necessary steps leading to the abatement of such pollution or the correction of such potential source of pollution.

Since 1990, the Connecticut Department of Environmental Protection has approved over 125 voluntarily developed agriculture waste and/or nutrient management plans and plan revisions statewide. These plans have been developed in cooperation with agricultural operators, the Natural Resources Conservation Service, and the University of Connecticut’s Cooperative Extension System. This on-going planning effort is used in conjunction with the existing authority provided for by the state’s water pollution control statutes.

B. Water Quality Standards

The Commissioner is empowered to adopt, and has adopted, water quality standards for the State of

⁴ No person or municipality shall initiate, create, originate or maintain any discharge of water, substance or material into the waters of the state without a permit for such discharge issued by the commissioner.... Conn. Gen. Stat. § 22a-430(a).

⁵ Pollution abatement orders occupy a central role in the commissioner’s ability to act administratively and expeditiously to address actual or potential sources of pollution. The text of the statute provides, in pertinent part, as follows: “If the commissioner finds that any person has established a facility or created a condition...or is maintaining any facility or condition which reasonably can be expected to create a source of pollution to the waters of the state, he may issue an order to such person to take the necessary steps to correct such potential source of pollution....If the commissioner finds that the recipient of any such order fails to comply therewith, he may request the Attorney General to bring an action in the superior court for the judicial district of Hartford to enjoin such person from maintaining such potential source of pollution to the waters of the state or to take necessary steps to correct such potential source of pollution....” Conn. Gen. Stat. § 22a-432.

Connecticut. Conn. Gen. Stat. § 22a-426. The Commissioner submits, and the United States Environmental Protection Agency (EPA) approves, the most current version of the water quality standards. These standards contain in their narrative portion a specific policy of antidegradation, in addition to specific water quality classifications, which constitute a comprehensive exposition of the state's public policy. These standards shall not "plan for, encourage or permit any wastes to be discharged into any of the waters of the state without having first received the treatment available and necessary for the elimination of pollution." Conn. Gen. Stat. § 22a-426(a).

The surface water quality standards apply to all tidal waters, harbors, estuaries, rivers, brooks, watercourses, waterways, lakes, ponds, marshes, and bogs. These standards also apply to those portions of inland wetlands that are inundated or saturated by surface or ground waters at a frequency and duration sufficient to support the prevalence of vegetation typically adapted for life in saturated soil conditions and those portions of tidal wetlands below mean high water.

Specifically, the Class SA water quality classification for coastal and marine surface waters under these standards indicates that, for suspended and settleable solids, the allowable standard is "none other than of natural origin." The Class SB water quality standard for suspended and settleable solids allows:

none in concentrations or combinations which would impair the most sensitive designated use; none aesthetically objectionable; none which would significantly alter the physical or chemical composition of bottom sediments; none which would adversely impact organisms living in or on bottom sediments.

The surface water quality standards also provide for the requirement of controls on nonpoint sources of phosphorus and nitrogen which contribute to the eutrophication of any surface water, including streams, rivers, lakes, ponds, impoundments, and Long Island Sound, on a case-by-case basis.

The water quality goal for all Connecticut coastal and marine waters is either SB or SA. Therefore, no discharge that would preclude reaching those goals can be authorized. *Id.* The Commissioner may address violations of the standards through his pollution abatement order authority or by means of an administrative cease and desist order. Conn. Gen. Stat. § 22a-7.

II. ADDITIONAL AUTHORITIES FOR THE IMPLEMENTATION OF THE MANAGEMENT MEASURES FOR FACILITY WASTEWATER AND RUNOFF FROM CONFINED ANIMAL FACILITY MANAGEMENT (LARGE AND SMALL UNITS) AND FOR NUTRIENT MANAGEMENT THROUGHOUT THE SECTION 6217 MANAGEMENT AREA

Owing to the prominence of municipal regulation of land use within the State of Connecticut, authorization for many activities affecting confined animal facilities and agricultural lands rests with local planning and zoning commissions. The Commissioner himself plays a significant role in the work of municipal land use control bodies. He both advises and oversees regulation of activities having an impact on inland and coastal resources through the state's Coastal Management Act (CMA), Conn. Gen. Stat. §§ 22a-90 through 22a-112. These local planning and zoning authorities, with state oversight, have the ability to address nonpoint pollution from agricultural activities and require management measures in their regulations and approvals for specific activities.

A. Coastal Zone And Municipal Coastal Management

The General Assembly of the State of Connecticut has devoted special attention to the coastal communities bordering Long Island Sound, and has enacted legislation designed to offer additional protections to this natural resource. The DEP itself maintains an Office of Long Island Sound Programs, which coordinates the Commissioner's interactions with the coastal communities both on an advisory and regulatory level. The following statutory provisions allow for the implementation of the confined animal facilities management measures and the measure for nutrient management.

1. Coastal Management Act

The CMA offers a comprehensive combination of policy considerations, planning, regulation and enforcement designed to ensure that pollution to tidal and inland wetlands and watercourses, and the waters of the state located within the coastal boundary generally, is addressed in a manner consistent with the statutory programs specifically devoted to those topics. Conn. Gen. Stat. § 22a-92(a)(2); *see supra*. Upland development projects proposed within this statutory "coastal boundary" are subject to the policies and standards contained in the CMA, and cannot result in "adverse impacts on coastal resources" as defined by the CMA.⁶ Land use boards and commissions in coastal municipalities are required to conduct coastal site plan review (CSPR) for most activities that are proposed within the coastal boundary to ensure that projects are consistent with the CMA, and the review dovetails with the general provisions for zoning regulation within the state. Conn. Gen. Stat. § 22a-105(a). In their review of a CSPR, municipal land use agencies are authorized to modify, condition, or deny the activity proposed in a CSPR in order to ensure that the potential adverse impacts of the proposed activity on coastal resources are acceptable. Conn. Gen. Stat. § 22a-105(e); *see also* § 22a-106.

If necessary, municipal approvals of CSPR can be conditioned to require that certain measures be incorporated to ensure implementation of the confined animal facilities management measures and the measure for nutrient management. The mechanism for bringing these requirements within the consideration of the municipal agencies would be through the Commissioner's oversight function, *see infra*, and the municipalities' obligation to ensure against adverse impacts to coastal resources and water quality.

The Commissioner is responsible for overseeing the municipal implementation of the CMA, including comment and recommendations regarding the proposal of any municipal plan of conservation and development, or zoning regulations. Conn. Gen. Stat. § 22a-104. He has the authority to take such legal action as is necessary to ensure that activities subject to CSPR receive the necessary approvals and comply with all conditions; that municipal CSPR is properly undertaken by land use boards and commissions; and that decisions rendered at the municipal level are consistent with the goals and policies contained in the CMA. Conn. Gen. Stat. § 22a-110. The Commissioner is empowered to submit comments upon specific matters pending before municipal agencies responsible for conducting CSPR; to appear before any such agency; and to appeal the decision of any municipal agency responsible for CSPR. *Id.* The Commissioner may also request that the Attorney General initiate legal

⁶ "Adverse impacts on coastal resources" include but are not limited to: "Degrading water quality through the significant introduction into either coastal waters or groundwater supplies of suspended solids, nutrients, toxics, heavy metals, or pathogens, or through the significant alteration of temperature, pH, dissolved oxygen or salinity...." Conn. Gen. Stat. §22a-95(15)(A).

action to enforce the substantive provisions of the CMA, apart from municipal enforcement activities, which are also cognizable under the CMA. Conn. Gen. Stat. § 22a-106a & § 22a-108.

2. Connecticut General Assembly Public Acts 91-170 & 91-398

Public Acts 91-170 and 91-398, codified, respectively, as Conn. Gen. Stat. § 8-2(b) and § 8-23(a) in the state's zoning and planning statutes, require that the zoning regulations and plans of conservation and development (POCD) for any municipality contiguous to Long Island Sound be adopted with reasonable consideration for the restoration and protection of the ecosystem and habitat of Long Island Sound. Municipal regulations and POCDs must be designed to reduce hypoxia, pathogens, toxic contaminants, and floatable debris in Long Island Sound. *Id.* The regulations and POCDs must also provide that municipal planning and zoning commissions consider the environmental impact on Long Island Sound of any development proposal. The provisions of these two Public Acts encompass all land use within a coastal municipality, and not just that proposed within the coastal boundary (*see* CMA discussion above).

The Commissioner's Office of Long Island Sound Programs has developed a document entitled *Coastal Water Quality: A Guide for Local Officials* as a Coastal Zone Management Act Section 309 enhancement task, in order to aid in the implementation of Public Acts 91-170 and 91-398. The guide contains a model stormwater ordinance that can be adopted by coastal municipalities to meet the requirements of these enactments. The model ordinance encourages municipalities to require a stormwater management plan for all projects, especially those that have greater potential to impact Long Island Sound and other waters of the state. In adopting the stormwater ordinance, municipalities will augment their existing regulations and protect against most adverse water quality impacts associated with confined animal facilities and agricultural nutrient use.

Several standards and criteria are provided in the model ordinance with which stormwater management plans must be consistent. These include:

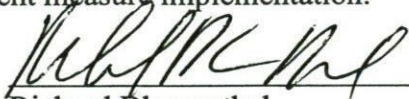
- Direct channeling of surface water runoff into adjacent ground and surface waters and tidal wetlands shall be prohibited.
- Pollutants shall be controlled at their source to the maximum extent feasible in order to contain and minimize contamination.
- Stormwater systems shall be designed and maintained to manage site runoff in order to eliminate surface and groundwater pollution, prevent flooding and, where required, control peak discharges and provide pollution treatment.
- On-site storage of stormwater shall be employed to the maximum extent feasible.

Once adopted, these criteria will help municipal land use commissions ensure that discharges from confined animal facilities are limited and stored on-site, that contaminant concentrations are minimized, and that stored runoff and accumulated solids from the facilities are managed through an appropriate waste utilization system.

Although Public Acts 91-170 and 91-398 apply only to municipalities bordering on Long Island Sound, the water quality guide will be instrumental in ensuring broader implementation of the confined animal facilities management measures and the measure for nutrient management throughout the Section 6217 management area for the following reason. The guide will be utilized as an outreach tool

to inland municipalities located in the Section 6217 management area, and the model stormwater ordinance was drafted in such a way that it can be adopted by any municipality. As Section 6217 management area municipalities adopt stormwater ordinances, the confined animal facilities management measures and the measure for nutrient management will be implemented.

In conclusion, there are no other aspects of state law in the water pollution control statutes or other authorities that would limit or preclude the use of the authority to regulate nonpoint source pollution from confined animal facilities and from agricultural nutrient use. Any actual or potential source of nonpoint pollution, regardless of location within the state, can be addressed by the state's water pollution control authorities. It is not necessary for the state or its municipalities to issue additional regulations prior to using this authority to ensure management measure implementation.



Richard Blumenthal
Attorney General, State of Connecticut