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Your Home Is Our Business

January 27, 2016

To: Karl Wagener, Executive Director, Sue Merrow, Chair, and Members
Connecticut Council on Environmental Quality

From: Bill Ethier, CAE, Chief Executive Officer

Re: Dec. 4, 2015, Draft Report, "Digging Connecticut"

Thank you for the invitation to comment on the above referenced report. While you will not like what we have to say about the report, we do appreciate the opportunity to comment.

Summary: We find the report lacking in credibility because it contains unsubstantiated and inaccurate statements. The preliminary conclusion that there's a major problem with stormwater control failures that needs to be addressed appears to not be based on sound analysis. In short, the report presents a series of solutions in search of a problem and other so-called solutions that would make the already difficult regulatory environment in CT intolerable. Where there are stormwater problems on sites, they appear to be addressed by the current regulatory scheme. Therefore, regarding the 14 recommendations CEQ makes at the conclusion of the report, we support two, oppose most others and where we do not comment specifically on a recommendation, we also hereby endorse and support the comments made by attorney Tim Hollister on behalf of Tilcon.

General Comments: It is our understanding that the report was generated because of a perceived need to address a common thread or "pattern of common problems" with stormwater controls. According to the report and comments made by Mr. Wagener at a CBIA E2 meeting held on Jan. 15, this perceived problem is based on the receipt of three citizen complaints about stormwater issues. One complaint dealt with runoff from a solar farm during an extraordinary 4" rain event, one dealt with a mining operation, and the third was not even a stormwater pollution problem but rather the complaint of an archeologist that the archeological review process in the construction stormwater general permit (SW GP) is, in his or her view, difficult for registrants or others to follow.

There are perhaps hundreds – if not a thousand – earth moving events every year in this state, from residential, commercial and industrial development, to farming activities, to operations such as solar farms, mining operations and other human activities. Three citizen complaints, with only two dealing with stormwater runoff issues, in no way, shape or form create a "pattern of common problems." To form this conclusion stretches CEQ's credibility beyond disbelief into the bizarre. If there are other complaints or DEEP investigations that show additional instances of stormwater runoff issues, CEQ needs to

document these instances to even begin to substantiate its claimed common problem conclusion.

Indeed, the report (p. 4) notes that there were 21 sites inspected by DEEP in FY 2015 and violations were found at only four. The 21 sites were inspected because of complaints or incomplete registrations, according to CEQ's report. Unanswered are the substance of the violations found. Were these four violations paperwork violations? Were any real stormwater control failures corrected as a result of the inspections? The report notes that "[i]t is hard to extrapolate from such a small sample size" yet goes on to wildly extrapolate that this "data suggests that dozens of violations go undetected each year." There is absolutely no basis to conclude that any sizeable number of pollution issues go undetected and, therefore, could not generate a complaint or a DEEP inspection. We are talking about surface stormwater that – if it leaves a site – openly travels downhill or downstream and would be visible to anyone in the vicinity. We're not talking about VOC contamination of groundwater that may not manifest itself for years or at all without an ASTM Phase I or II site assessment.

An alternative and more credible extrapolation could be the following. DEEP's inspections in FY 2015 show that a relatively small percentage of sites inspected (19%) have some type of violation (paperwork, minor SW control failure, or major SW pollution issue is unknown). This means that 81% of complaints about stormwater issues are unfounded or incomplete registrations do not otherwise show a violation. And, of all the hundreds of earth moving activities that occur each year, the small number of complaint-generated inspections (i.e., 21) and the 19% figure for violations found (i.e., 4) from those inspections suggest there is a very small percentage of stormwater pollution problems from regulated activities in Connecticut. Of course, this begs the question that CEQ may want to investigate and report on: What major earth moving activity or activities remain unregulated in CT? For example, is farming sufficiently regulated? The amount of earth that's moved and turned over in agriculture far exceeds that from development. So, is CEQ focused on the wrong culprit if it perceives a problem with stormwater runoff issues?

CEQ seems to suggest that we should regulate to a level or standard to handle extremely rare rain events (e.g., the 4" rain that fell on East Lyme in March, 2014). It would be a huge cost to regulate to a 4" rain event. No regulator in the nation to our knowledge does so. The tone of the report reveals that CEQ seems indignant that such events were claimed to be "unforeseen" by the regulated entity in that case (a solar farm). It's a matter of terminology perhaps – unforeseen or unprecedented. But to use "unforeseen" as CEQ would want (i.e., we can foresee it, so we should regulate it), then we can foresee that at some point in CT's history, we will experience a 9.0 earthquake and we will be buried by a 6' snowfall in a 24 hour period. Does this mean we should regulate building construction to these extremes? We have to maintain reason, common sense and balance in what and how much we regulate or we will continue to lag the nation's economy. State government will continue to struggle to find resources to do its important work. Only a strong, growing economy will produce the financial resources for government to spend on improving the public's health and safety and our environment.

CEQ laments, based on unfounded conclusions, DEEP's "weak enforcement tools." It suggests that a Notice of Violation (NOV) is of little use because the regulated entity is not penalized for a violation. However, NOV's do work to correct stormwater control issues. If a regulated entity receives a NOV, everyone I know in our industry pays close attention to it and goes out and corrects the issue. Is that not a good result? A sound, reasonable regulatory policy is one that educates first to correct any deficiencies, then penalizes only after the failure to heed the regulator's warning. CEQ seems to want to start with a penalty.

Moreover, we are surprised that CEQ is not aware of the extensive enforcement tools at DEEP's disposal. CEQ should review again DEEP's written enforcement policy and the Construction SW GP itself. Enforcement tools include the authority to revoke a GP registration, to require additional certification from another third party, to issue penalties up to $25,000/day and, contrary to CEQ's awkward misreading of 22a-430b(c) (at p.4), require a registrant to submit an individual stormwater permit – something no registrant ever wants to do given the expense and delay that would ensue. You cannot get more harsh penalties and CEQ seems to suggest that regulators should pile on with more "administrative" penalties. Of course, all enforcement tools mentioned are administrative. CEQ seems to want to punish any violators, while if DEEP does not or has not used some of these tools, an alternative conclusion might be that its regulators want to fix issues first, reserving more harsh treatment for those registrants unwilling to fix their SW GP issues. We don't mean to unnecessarily or inappropriately extrapolate, but maybe the failure to impose financial penalties or revoke a GP or require the filing of an individual SW permit means that issues are being fixed as soon as they are discovered. In our view, this is a good result and no additional enforcement tools are needed.

CEQ also complains that there is no turbidity limit and such a standard should be incorporated into the GPs. The problem is that even the federal EPA's turbidity limit was stayed by court order because its limit was not scientifically defensible. The EPA has been unable to propose a defensible turbidity limit – that's the purpose of monitoring turbidity levels, which is occurring nationwide, to eventually lead to a defensible turbidity limit in the future. Connecticut should not jump ahead of the science and engineering needed to justify a rationale, reasonable turbidity limit. If CEQ nonetheless insists that one be established, it should propose a specific limit with defensible documentation.

CEQ erroneously states that CT statutes require DEEP to audit ten percent of all professional engineer certifications that accompany construction SW GP registrations. In fact, the statute clearly states that it is a goal of the commissioner to audit up to ten percent; it is not a requirement. This language was put in statute by DEEP itself and changing it to a requirement could divert limited staff resources from the more important work of investigating potential issues and correcting SW control problems as they occur.

Visits to problem sites, while "a significant deployment of resources" as stated by CEQ (p. 6), is exactly how the GP system is supposed to work. Accepting GP registrations frees up DEEP resources so they have the time to inspect problem sites and get issues corrected. Without the GPs, DEEP would not have had the time to visit the solar farm referenced, or likely any sites at all. Major sites or SW control problems may then go uncorrected.

Historic, archeological and endangered species reviews connected with the Construction SW GP are other issues raised by CEQ. Processes are laid out in the GP to consider each of these issues. If the processes in the GP are complicated, then we agree they should be simplified. CEQ proposes, however, that the way to fix this should be the creation of stand-alone regulatory systems. The problem with this conclusion is that the regulatory authority to require private property owners to review historic, archeological or state listed endangered species is, arguably, very limited or nonexistent in the first place. CEQ's proposals would significantly expand the regulatory reach of government, well beyond that ever intended by the legislature. Our solution to simplify these issues is to remove their reference from the GPs altogether, at least as they apply to private property.

In particular, the requirement to review state listed species for private projects ignores the safe harbor provision of CGS sec. 26-311(b). The Connecticut Endangered Species Act (CESA) simply does not apply to private projects, and folding it into the SW GP violates CESA's safe harbor provisions. See "Application of Connecticut's Endangered Species Act to Private Property: Prudent Public Policy or Regulatory Rattlesnake" by Greg Sharp, Esq. (Connecticut Lawyer, Dec 2006/Jan 2007, p 24).

Transparency is important, as stated by CEQ, for lots of reasons. The problem noted by CEQ at the bottom of p. 8 with the monthly posting of just a list of registrations is on its way to being solved by the resolution CEQ itself notes at the top of p. 9. That is, technology and the ability of DEEP to both receive and post actual registrations online (versus post just a list of registrations) is the answer. Complete resolution may be a resource issue. However, this is one area in which we agree with the CEQ report and its related recommendations.

Other than, again, our endorsement and agreement with the comments made by attorney Hollister, we do not otherwise comment at this time on the portions of the report related to mining operations or solar farms and we reserve the right to make additional comments if and when any recommendations appear before the legislature.

Recommendations: Based on the comments made above, we offer the following positions on CEQ's 14 recommendations.

1. We of course support simplicity and clarity as a goal, but the bulleted suggestions on how to achieve these goals do not comport with being reasonable or rationale. For example, eliminating phrases such as "where possible" in conjunction with "shall" in the GPs ignores the fact that some things are not physically, technically or economically feasible. CEQ would greatly heighten the regulatory bar to such an extent with this one change that it would effectively disallow many economic development and other activities. The insertion here of an historic resources checklist issue would seem to better fit in recommendation #9. Use of 2015 Nat'l Weather Service data is likely OK without knowing what other metrics or measures of rain data exist (in other words, we do not presume that the Nat'l Weather Service is infallible). However, the regulatory system still needs to use historical averages. Finally, we oppose insertion of a turbidity limit for reasons stated above.

2. No comment on adopting a solar farm GP. We presume that industry will address this.

3. Oppose any more enforcement tools. First, we question the need as the report's conclusions are unsubstantiated. Second, ample tools already exist and as noted above, CEQ's issues may be just that it has a different regulatory philosophy from DEEP.

4. DEEP already has this authority. No change is necessary.

5. Authority to revoke a GP is clear. CEQ's reading (and DEEP's reading, according to CEQ) of 22a-430b(c) is strained at best. It seems very clear to us as providing DEEP the additional tool of requiring a registrant to apply for an individual permit. If it has not been used, it could be an indication that either DEEP understands how harsh this tool would be or that its use has not been necessary as problems can be fixed using other tools at DEEP's disposal, such as NOVs. No change is necessary.

6. and 7. We agree that SW GP registrations and inspection reports should be posted online.

8. Oppose requiring the audit of ten percent of all certifications because it would divert DEEP resources from addressing the more serious issues and interferes with administrative discretion to direct limited resources where most needed. As for historic and archeological reviews, as noted above we question the authority for any such review, so audits focused on these reviews only are not warranted.

9. Oppose stand-alone SHPO reviews of private activity on private property. This would cause unnecessary delays and costs. It would be a full employment act for university and other archeologists but at a cost that would severely disrupt economic and housing development. This is something Connecticut can ill afford. To the extent the GP can be simplified by revising the step by step analysis a registrant undertakes, then it should be simplified. However, as referenced in 8. above, we question the authority to undertake such a review in the first place, connected to the SW GP or not.

10. No comment, other that noted above.

11. See comments above and on recommendations 8 and 9.

12. and 13. No comment, other that noted above.

14. Oppose this drastic and extensive expansion to the CT Endangered Species Act. See comments above regarding this issue. Rather, DEEP should remove section 3(b)(2) and App. A from the construction SW GP because it's not authorized by CESA, at least for private property. The GP should adopt the safe harbor language of CGS Sec. 26-311(b). No legislative change is necessary.

Thank you again for the opportunity to comment on CEQ's report, "Digging Connecticut." We urge you to hold its publication, and to rewrite it with substantiation of a problem that needs to be addressed.