SCCOG

Public Act 21-29 and "Navigable Waterways"

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Public Act 21-29 Modifications to C.G.S. Section 8-2

Connecticut municipal zoning commissions, and combined planning and zoning commissions, are by now familiar with Public Act 21-29 and its impact on local regulations and land use processes. Most notably, P.A. 21-29 contains major changes to the Zoning Enabling Act (Chapter 124 of the Connecticut General Statutes (C.G.S.)), which have prompted commissions to revise their regulations. These changes include modifications of C.G.S. Section 8-2, which defines the scope of zoning's regulatory power—what zoning can and cannot do.

In part, P.A. 21-29 modified C.G.S. §8-2 was by rewording and slightly expanding the scope of former subsection (b). Since C.G.S. §8-2 was heavily modified by P.A. 21-29, it was also reordered, so former subsection (b) is now contained in C.G.S. §8-2(b)(10).

Old statutory language	***New statutory language effective October 1, 2021***
(b) In any municipality that is contiguous to Long Island Sound the regulations adopted under this section shall be made with reasonable consideration for restoration and protection of the ecosystem and habitat of Long Island Sound and shall be designed to reduce hypoxia, pathogens, toxic contaminants and floatable debris in Long Island Sound. Such regulations shall provide that the commission consider the environmental impact on Long Island Sound of any proposal for development.	*(b) Zoning regulations adopted pursuant to subsection (a) of this section shall: …* *…(10) In any municipality that is contiguous to or on a navigable waterway draining to Long Island Sound, (A) be made with reasonable consideration for the restoration and protection of the ecosystem and habitat of Long Island Sound; (B) be designed to reduce hypoxia, pathogens, toxic contaminants and floatable debris on Long Island Sound; and (C) provide that such municipality's zoning commission consider the environmental impact on Long Island Sound coastal resources, as defined in section 22a-93, of any proposal for development.*

The subsection now applies not only to the municipalities with shore frontage along Long Island Sound, but also to municipalities "contiguous to or on a navigable waterway draining to Long Island Sound".

- As it had previously, the subsection requires that regulations in these municipalities be made with reasonable consideration for restoration and protection of the ecosystem and habitat of Long Island Sound.

- As it had previously, the subsection requires that regulations in these municipalities be designed to reduce hypoxia, pathogens, toxic contaminants and floatable debris in Long Island Sound.

- As it had previously, the subsection requires that such regulations provide that the commission consider the environmental impact on Long Island Sound of any proposal for development. This last clause was clarified with P.A. 21-29. It now applies not just to Long Island Sound, but to its "coastal resources, as defined by section 22a-93", which is contained in the Coastal Management Act (C.G.S. §22a-90 through §22a-111).

The Definition of Navigable Waterway/Waters

The term "navigable waterway" was left undefined in C.G.S. §8-2(b). Two other sections of the Connecticut General Statues offer clues as to its meaning: C.G.S. §15-3a and §22a-359.

C.G.S. §15-3a

(3) "Navigable waters" means waters which are subject to the ebb and flow of the tide shoreward to their mean high-water mark;

(4) "Navigable waterways" means waters which are physically capable of supporting water-borne traffic, and subject to the ebb and flow of the tide.

C.G.S. §22a-359

(e) …"Navigable waters" means Long Island Sound, any cove, bay or inlet of Long Island Sound, and that portion of any tributary, river or stream that empties into Long Island Sound upstream to the first permanent obstruction to navigation for watercraft from Long Island Sound.

C.G.S. $15-3a uses the term "navigable waterways" and differentiates it from "navigable waters", which is used in §15-3a and §22a-359. It should be noted that the definition of "navigable waters" is different between the two sections; C.G.S. §22a-395 has a much broader definition because it includes freshwater rivers and streams, not just tidally influenced waters.

Chapter 263 of the Connecticut General Statutes, in which C.G.S. §15-3a is located, is a chapter dedicated to municipal Harbor Masters. Chapter 446i, in which C.G.S. §22a-359 is located, concerns Water Resources and Invasive Plants. Title 22a concerns environmental protection and laws pertaining to the Connecticut Department of Environmental Protection.

Connecticut's Coastal Management Act

New C.G.S. §8-2(10)(b) contains a reference to the Coastal Management Act (C.G.S. §22a-90 through §22a-111). The Coastal Management Act does not contain a definition of "navigable waterways" or "navigable waters"; however, when the term "navigable waters" is used in the Act, reference is made to the definition contained in C.G.S. §22a-359.

The Clean Water Act

The Clean Water Act of 1972 is designed to prevent pollution to "navigable waters". Rulemaking defined "navigable waters" as "waters of the United States", and due to a long history of case law, revised rules, and Executive Orders, the meaning of "waters of the United States" has evolved constantly, expanding and receding in scope since the passage of the Act.

Possible Interpretations

Absent reference to a specific definition, "navigable waterway" as used in C.G.S. §8-2(b)(10) remains unclear. The geography implied by both discussed statutory definitions is actually very similar, since the law would apply to zoning commissions of all municipalities containing a navigable waterway. In fact, the only difference is the inclusion of the Town of North Stonington under C.G.S. §22a-395. The federal definition, on the other hand, could apply to all municipal zoning commissions in southeastern Connecticut, based on an understanding of past interpretations under the Clean Water Act. It is this author's opinion that the Clean Water Act definition would be less likely to apply.

Southeastern Connecticut zoning commissions contiguous to "navigable waters", C.G.S. §22a-359 definition

From East to West:

Town of East Lyme
Giants Neck Beach Association (East Lyme)
Black Point Beach Club (East Lyme)
Crescent Beach Association (East Lyme)
Town of Waterford
City of New London
Town of Montville
City of Norwich
Town of Preston
Town of Ledyard
Town of Groton
City of Groton
Groton Long Point Association (Groton)
Noank Fire District (Groton)
Town of Stonington
Borough of Stonington
Town of North Stonington

Southeastern Connecticut zoning commissions contiguous to "navigable waterways", C.G.S. §15-3a definition

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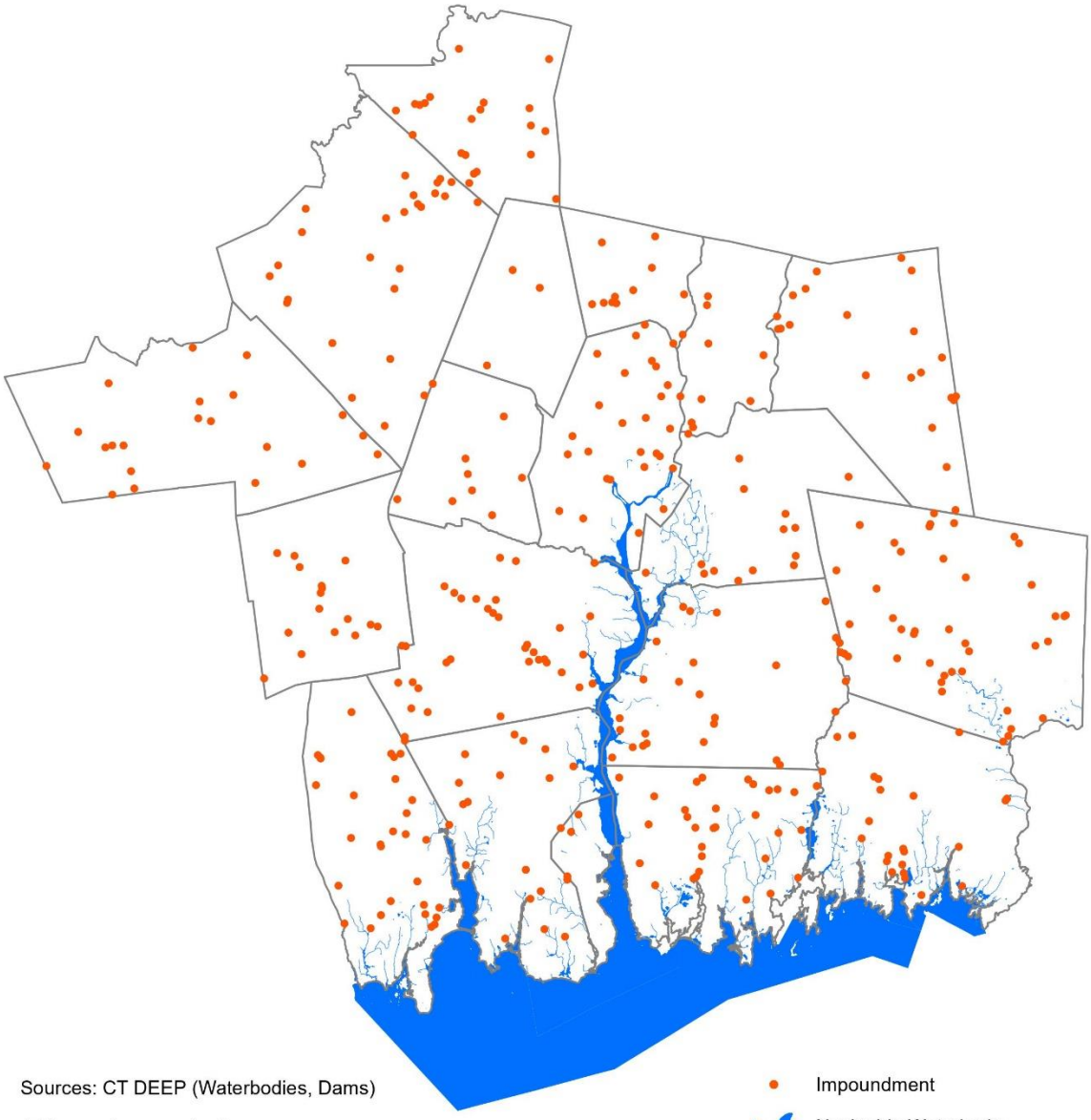
City of Groton
Groton Long Point Association (Groton)
Noank Fire District (Groton)
Town of Stonington
Borough of Stonington

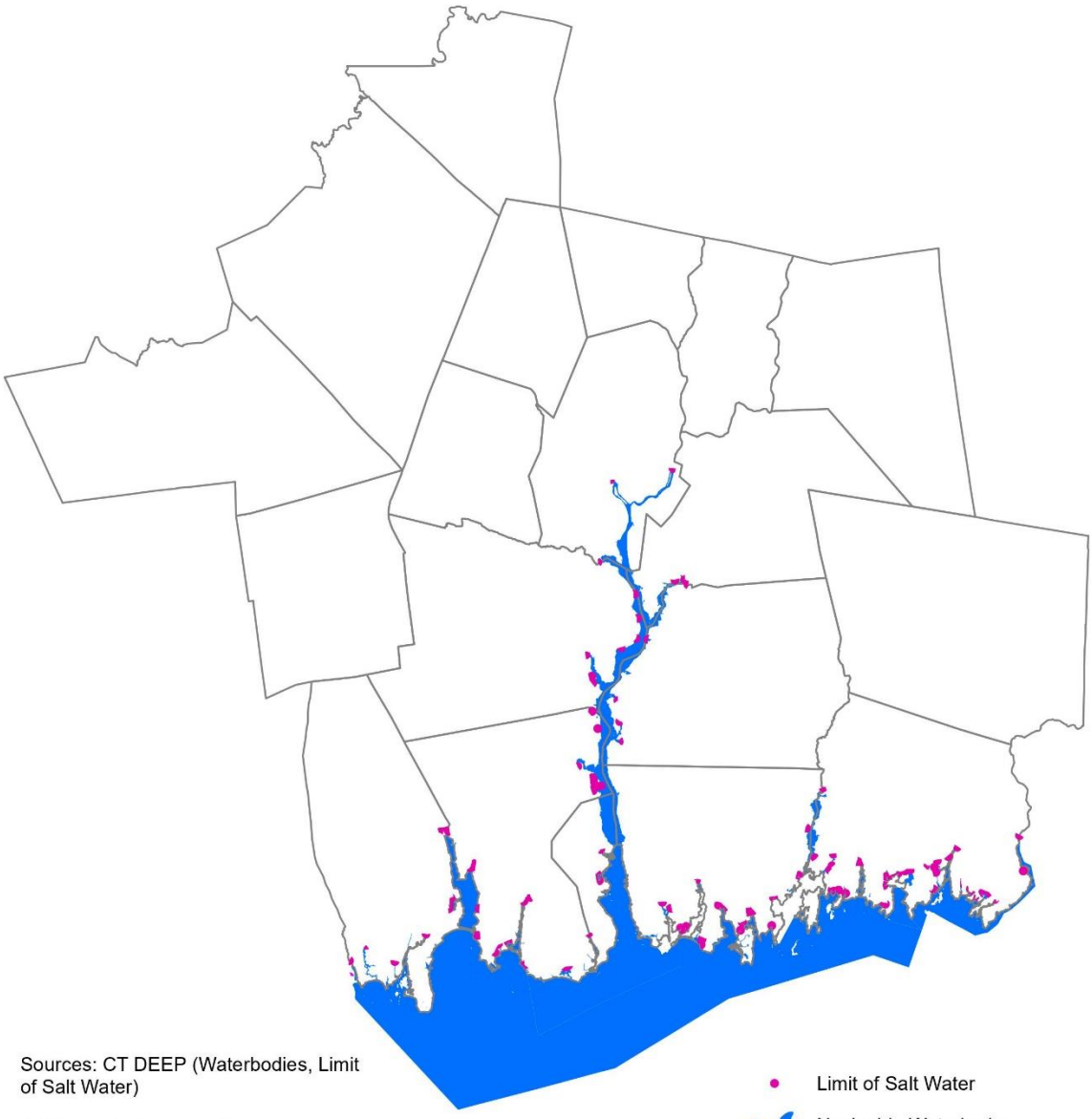
"Navigable waters" definition given in CGS §22a-359



Sources: CT DEEP (Waterbodies, Dams)

This map is approximate.

"Navigable waterways" definition given in CGS §15-3a



Sources: CT DEEP (Waterbodies, Limit of Salt Water)

This map is approximate.