UPDATE ON THE LAW OF WETLANDS, VERNAL POOL SPECIES AND AQUIFER PROTECTION AREAS IN CONNECTICUT

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I. Wetlands Developments

Many of the significant disputes in recent wetlands cases have concerned not the wetlands or watercourses themselves, but the upland areas surrounding them. Connecticut's municipal wetlands agencies have recently been increasing the regulated area around wetlands and asserting control over activities proposed in those areas on the grounds that such activities may impact wetlands or the wildlife that depend on them.

The ability of wetlands agencies to regulate in upland areas was squarely confronted by the Connecticut Supreme Court in its September 2001 decision in Queach Corporation v. Inland Wetlands Commission of the Town of Branford, 258 Conn. 178. Queach was an administrative appeal challenging the validity of amendments to the Branford wetlands regulations concerning the definition of "regulated activity" and the size of the upland review area. The plaintiffs owned abutting parcels in Branford totaling 205 acres that they were attempting to subdivide into residential lots. Although the wetlands commission had rendered an advisory report on the plaintiffs' proposed subdivision to the town's planning and zoning commission, significantly the subject appeal did not challenge a decision on a wetlands application.

In July 1999, after the plaintiffs' subdivision application had been denied by the planning and zoning commission, the wetlands commission adopted changes to its regulations in response to recommendations from the DEP to conform the regulations to the General Statutes as amended in 1995 and 1996. The plaintiffs contested the validity of two of the regulatory amendments with regard to the definition of regulated activities; the increase from 50 to 100 feet for the upland review area; the requirement to provide alternatives for non-regulated activities and construction in the review area; the discretion provided the commission to regulate activities occurring outside the wetlands areas; and the authority of the commission to regulate groundwater levels. The Superior Court for the Judicial District of New Haven (Blue, J.) held that the plaintiffs were statutorily aggrieved and had standing to bring a facial challenge to the regulations, but declined to review the regulations as applied to the plaintiffs' proposal and held that the challenged regulations were facially valid. See 28 Conn. L. Rptr. 44 (Sept. 1, 2000).

The Supreme Court affirmed. It began by organizing the plaintiffs' challenges into two categories: (1) whether the trial court properly limited its decision to a facial review of the regulations; and (2) whether the trial court properly concluded that the amendments were facially valid and in conformity with the statutes. 258 Conn. at 188-89. As to the first issue, the court rejected the claim that the trial court should have decided whether the regulations were valid as applied to the plaintiffs' development. "Trial courts are not required to make predictions about how a commission may one day apply amended regulations to a potential claimant." Id. at 190. The plaintiffs did

not meet their burden of presenting the court with a sufficient factual basis demonstrating the adverse impact of the regulations as applied to them, since they had not filed an application with the wetlands commission that was before the court and the regulations had not been applied by the commission to an actual proposal.

As to the merits, the plaintiffs claimed that the regulatory amendments conflicted with the language of General Statutes § 22a-38(13) and § 22a-42a(f). First, they argued that the Commission impermissibly expanded the definition of "regulated activity" beyond the activities enumerated in § 22a-38(13) by including "clearing," "grubbing" and "constructing." The Supreme Court quickly dispensed with this argument by noting that the statute "authorizes wetlands commissions to legislate broadly," the statutory definition of regulated activity is permissive, and "a wetlands commission is not required to use the exact language set forth by the act when adopting regulations, so long as the additional language is in conformity with the act's purposes and goals." Id. at 196.

The plaintiffs next argued that the Commission's definition of regulated activity conflicts with the 1996 amendment codified at General Statutes § 22a-42a(f).[1] The plaintiffs in Queach contended that the Commission's definition of "regulated activity" illegally extended beyond § 22a-42a(f) and allowed the Commission unfettered discretion to regulate activities outside of wetlands areas or defined upland review

[1] Section 22a-42a(f) provides: "If a municipal inland wetlands agency regulates activities within areas around wetlands or watercourses, such regulations shall (1) be in accordance with the provisions of the inland wetlands regulations adopted by such agency related to application for, and approval of, activities to be conducted in wetlands

areas. The Supreme Court rejected the plaintiffs' argument that § 22a-42a(f) effectively superseded the court's earlier decisions in cases such as Aaron v. Conservation Commission, 183 Conn. 532 (1981), "which held that activity that occurs in non-wetland areas, but that affects wetland areas, falls within the scope of regulated activity." Queach, 258 Conn. at 197. Rather, the court found that this statute "effectively codifies" its previous holdings, and held that the challenged regulation does not facially conflict with that statute. Under the regulation and the statute, the court held, "if the activity is a 'regulated activity,' and if it is 'likely to impact or affect wetlands or watercourses,' then the agency may make a determination." Id. at 198.

The court next rejected the plaintiffs' challenge to the commission's change from a 50 foot to a 100 foot upland review area. It found that the change in the review area does not automatically bar development within 100 feet of a wetland, but merely provides a basis for the commission to determine whether such activities will have adverse impacts on the adjacent wetland or watercourse. It also found sufficient evidence in the record supporting the increase. Id. at 201-202. Finally, the court rejected the plaintiffs' argument that the regulations unlawfully require an applicant to submit alternatives for activities in upland review areas that may not impact wetlands, and their claim that the commission exceeded its authority in regulating groundwater levels, finding both of the amendments to be consistent with the language and purposes of the enabling statute.

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or watercourses and (2) apply only to those activities which are likely to impact or affect wetlands or watercourses."

Superior Court cases both before and after Queach have upheld decisions by wetlands commissions to increase their upland review area to 100 feet. See, e.g., Harris v. New Milford Inland Wetlands and Watercourses Commission, 31 Conn. L. Rptr. 44 (Nov. 21, 2001); Danziger v. Conservation Commission of Newtown, 29 Conn. L. Rptr. 367 (Feb. 20, 2001). Recent decisions also have upheld denials of wetlands permits based solely on activities in upland areas. See Prestige Builders v. Inland Wetlands Commission of Ansonia,[2] 30 Conn. L. Rptr. 563 (Oct. 19, 2001) (holding commission had jurisdiction and substantial evidence to deny permit for upland activities notwithstanding the lack of express authorization in the regulations to regulate in upland areas); Ashe v. New Fairfield Conservation Commission, 30 Conn. L. Rptr. 506 (Oct. 2, 2001) (upholding regulation that prohibited activity within 75 feet of wetlands or watercourses but authorized the agency to permit such activities upon finding that they will not harm the adjacent wetland). Finally, as discussed more in Section IV.C of these materials, at least one trial court has relied on Queach in affirming the denial of a proposal based on impacts to the upland habitat of wetland-dependent species. AvalonBay Communities, Inc. v. Wilton Inland Wetlands, 2002 WL 194535 (Jan. 15, 2002).

[2] The Appellate Court granted certification in this case on January 11, 2002.

II. **Vernal Pool Species and Habitat Preservation**

The primary development of late in the area of habitat preservation has been the increasing tendency of municipal wetlands commissions to regulate development activities in upland areas that provide habitat for wetland-dependent species. In AvalonBay Communities, Inc. v. Wilton Inland Wetlands, 2001 WL 1178565 (Sept. 6, 2001), the plaintiff proposed a 119-unit apartment development on 10.6 acres adjacent to Route 7 in Wilton. The site plan -- as revised after an initial denial -- proposed no activities within a wetland or watercourse or the designated upland review areas. The commission denied the application, finding that AvalonBay had failed to demonstrate that there was no feasible and prudent alternative which would have less impact on the salamanders found on the site. AvalonBay appealed, claiming that the commission improperly exercised jurisdiction over a site plan that did not propose any construction activities in a wetland, watercourse or regulated area, and did so based solely on its finding that the site plan would disrupt a non-wetland habitat of a common species of salamander; it also claimed that even if the commission had jurisdiction, there was no evidence in the record of any impact on a wetland or watercourse.

The commission argued that it had jurisdiction over the AvalonBay application because the proposed development would impact the wetlands by reducing their biodiversity, in that the development would adversely affect the population of spotted salamanders in the upland portion of the site, and spotted salamanders are an "obligate" wetlands species. The DEP joined the appeal in support of the commission and argued that the salamanders are part of the wetlands resources. The court found that the

commission lacked jurisdiction over AvalonBay's application. It held that the 1995 and 1996 amendments to the Inland Wetlands and Watercourses Act were intended "to limit, rather than expand, and inland wetlands commission's jurisdiction to regulate activities that impact or affect a wetland area." It found that the DEP and the commission urged too broad a reading of the statute and that the commission improperly denied AvalonBay's permit application because of a potential impact on a wetlands species outside of the regulated buffer areas. It also found that neither side's experts could quantify the extent of the salamander population at the site, thus "the commission based its denial on inconclusive and speculative data." The court sustained AvalonBay's appeal.

A few weeks later, the Connecticut Supreme Court released its decision in Queach Corporation v. Inland Wetlands Commission of the Town of Branford, 258 Conn. 178 (2001). In Queach (discussed above), the Supreme Court upheld the facial validity of amendments to the Branford wetlands regulations expanding the definition of "regulated activity." The Wilton Inland Wetlands Commission and the DEP moved to reargue the September 2001 AvalonBay decision in light of Queach. The court held reargument.

In a decision dated January 15, 2002, Judge Munro reversed her earlier decision. AvalonBay Communities, Inc. v. Wilton Inland Wetlands, 2002 WL 194535. Relying on the similarity between the Wilton definition of "regulated area" and the Branford regulation approved in Queach, as well as the Supreme Court's discussion of the intent of the legislature in passing the enabling statute, the court held that the

commission properly exercised jurisdiction over AvalonBay's permit application because it involved activities that may detrimentally affect the wetlands on the subject property.

Turning to the evidence in the record, the court cited the commission's finding that the loss of the spotted salamander "will reduce the biodiversity" of the wetlands and that the loss of the salamander population on-site constituted an irreversible and irretrievable loss of wetland and watercourse resources. The court found that there was substantial evidence in the record to support the commission's finding that the development would impact the biodiversity of the wetland and watercourses by impacting the upland habitat of the spotted salamander. It therefore denied AvalonBay's appeal. As of April 12, 2002, AvalonBay's petition for certification was pending before the Appellate Court.

Our courts have also interpreted the Connecticut Environmental Protection Act to permit actions for declaratory and injunctive relief under General Statutes § 22a-16 in order to protect wildlife species. In Animal Rights Front, Inc. v. Plan and Zoning Commission of the Town of Glastonbury, 24 Conn. L. Rptr. 241 (March 4, 1999), the plaintiff sought injunctive relief on the grounds that the defendant commission's approval of a subdivision application was reasonably likely to impair or destroy timber rattlesnakes and whippoorwill. The court denied the defendants' motion to strike the complaint, holding that these species, although classified under the Endangered Species Act as "endangered" and "of special concern," are wildlife and therefore satisfy the definition of "natural resources" under CEPA. The court relied on the Connecticut

Supreme Court's decision in Paige v. Town Plan and Zoning Commission, 235 Conn. 448 (1995), that "wildlife" are included in the definition of "natural resources." See also Animal Rights Front, Inc. v. Rocque, 22 Conn. L. Rptr. 26 (April 16, 1998) (denying motion to dismiss action brought under Conn. Gen. Stat. § 22a-16 to enjoin the killing of fawn deer); but see Animal Rights Front v. Rocque, 63 Conn. App. 207 (affirming summary judgment for Commissioner), cert. denied, 256 Conn. 936 (2001).

III. **Aquifer Protection Areas**

A. Statutory Structure

Over 1 million residents, or 32% of the population in Connecticut, are supplied their drinking water by groundwater from aquifers. In 1988, the legislature required the DEP Commissioner to establish standards for mapping and modeling the location of all areas of contribution and recharge areas for existing wells located in stratified drift aquifers that are within water company water supply areas. Conn. Gen. Stat. § 22a-354b. Two standards of mapping, Level A and Level B, were established, with Level A being the more detailed mapping. Level B mapping was required to be accomplished by each public or private water company serving 1,000 or more persons by July 1, 1990. Within one year of DEP approval of Level B mapping, each municipality must inventory land uses overlying the mapped zones of contribution and recharge areas of such aquifers. Level A mapping must be completed by each public and private water company serving 10,000 or more persons not later than three years after DEP adopts a model municipal aquifer protection ordinance. Conn. Gen. Stat. § 22a-354c(a).

After it received the report of its Aquifer Protection Task Force dated February 15, 1989, the legislature passed Public Act 89-305, now codified at Conn. Gen. Stat. §§ 22a-354a to 354bb. The principal objective of this legislation, similar to the Inland Wetlands and Watercourses Act, is to require municipalities to regulate land use in aquifer protection areas consistent with model regulations provided by the DEP.

The triggering event for municipal regulation in aquifer protection areas is the DEP's adoption of regulations for land use controls in these areas. The Commissioner was required to adopt the regulations by July 1, 1991. Conn. Gen. Stat. § 22a-354i.[3] These regulations must establish best management practice ("BMP") standards for existing uses, and create a schedule for compliance of nonconforming "regulated activities." The Commissioner also must establish BMPs for, and prohibitions of, certain regulated activities in aquifer protection areas. "Regulated activity" is defined in the statute as any action, process or condition which the Commissioner determines, by regulation, "to involve the production, handling, use, storage or disposal of material that may pose a threat to groundwater," including structures and appurtenances related to the activity. § 22a-354h(1).

Following adoption of the DEP's regulations, the planning and zoning commission in each town containing an aquifer protection area is required to delineate on the zoning map the boundaries of those areas. § 22a-354n. Each such municipality

[3] As discussed below, the regulations have not yet been adopted. The Commissioner also was required to prepare by October 1, 1995 a model ordinance, consistent with the regulations, for use by municipalities in adopting their regulations. Conn. Gen. Stat. § 22a-354l. DEP has provided a non-binding guidance document for municipalities in the interim.

also must designate an existing board to act as its "aquifer protection agency" within three months after the DEP adopts its regulations. Within six months after the Commissioner approves Level A mapping, the aquifer protection agency must adopt regulations for aquifer protection. Once the municipal regulations are adopted, no regulated activity shall be conducted within any aquifer protection area without a permit from the town's aquifer protection agency. § 22a-354p.

The statutes provide for an appeal by a person aggrieved by any regulation or decision of the DEP or aquifer protection agency in a manner very similar to the statutory appeal from wetlands decisions. § 22a-354q. They also contain familiar enforcement provisions including the issuance of an order to stop or correct the activity, assessment of a fine of up to $1,000 per day, criminal penalties, and recovery of all costs, fees and expenses, including reasonable attorney's fees. § 22a-354s.

B. Proposed DEP Regulations

DEP issued a proposed regulation dated March 2000 and entitled "Aquifer Protection Areas - Land Use Controls," which will be codified at Regs. Conn. State Agencies §§ 22a-354i-1 through 10. As of mid-April 2002, the regulation was still being reviewed within the DEP and Office of the Attorney General prior to a revised version being made public.

After tracking the requirements and deadline in the statutes, the proposed regulation provides a long list of activities that are prohibited in an aquifer protection area if it is a new activity, and subject to the aquifer protection regulation if it is an existing activity. A listed activity will not be prohibited if it is: (1) an "ancillary

activity"; (2) exempted; (3) registered as an existing regulated activity; or (4) a modification of an existing regulated activity. An "ancillary activity" is a regulated activity that is "subordinate to, or supportive of" a non-regulated activity and which involves the use or storage at any one time of no more than 55 gallons of a hazardous substance. It must take place within an entirely enclosed building.

A new activity on the prohibited list may be permitted upon application for an exemption to the DEP if the Commissioner finds that the activity will not pose a threat to any existing or potential well field. The owner must demonstrate "clearly and convincingly" that a non-hazardous material has been permanently substituted for each hazardous material normally used in the activity, or that any hazardous material discharged to the groundwater would not require treatment. Existing regulated activities must be registered within 90 days after the municipality adopts aquifer protection regulations, and will be permitted to continue provided that they continue to comply with "Best Management Practices" outlined in the proposed regulations, which mirror current regulatory requirements.

The fourth possible exemption is modification of an existing and registered regulated activity, which means "to expand an existing regulated activity by increasing the physical size of the facility at which such regulated activity is conducted, or by increasing the storage capacity for hazardous materials; or to alter a regulated activity in a manner which may increase the risk of pollution of the affected aquifer." The regulation specifies the criteria by which certain existing activities may be modified as-of-right; with written confirmation from the applicable agency that the new activity is in

fact a non-regulated activity; with the written consent of the applicable agency and certification by a professional engineer or certified hazardous materials manager; or only by permit from the applicable agency.

The proposed regulation ends with a list of Best Management Practices for all regulated activities conducted in an aquifer protection area. The BMP's are broken down into mandatory requirements and "optional requirements," with the mandatory requirements pertaining mostly to the storage of hazardous materials.