ENVIRONMENTAL CONCERNS FOR DEVELOPERS: WETLANDS

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I. Connecticut Supreme Court Tackles Wetlands Jurisdiction

Many of the significant disputes in recent wetlands cases have concerned not the wetlands or watercourses themselves, but the upland areas surrounding them. A number of Connecticut's municipal inland wetlands agencies have recently been increasing the regulated area around wetlands or regulating 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, the 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 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. The court first rejected the claim that the trial court should have decided whether the regulations were valid as applied to the plaintiffs' development. It held that Superior Court judges "are not required to make predictions about how a commission may one day apply amended regulations to a potential claimant." 258 Conn. at 190. The plaintiffs did not present 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 and the regulations had not been applied by the commission to an actual proposal.

As to whether the regulation amendments were facially valid, the plaintiffs claimed that the 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 new definition of "regulated activity" conflicts with the 1996 amendment codified at General Statutes § 22a-42a(f).[1] They contended that the definition illegally extended beyond § 22a-42a(f) and allowed the Commission unfettered discretion to regulate activities outside of wetlands areas or defined upland review 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

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[1] § 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

wetland or watercourse. It also found sufficient evidence in the record supporting the increase. Id. at 201-202. Finally, the court rejected the plaintiffs' claim that the regulations unlawfully require an applicant to submit alternatives for activities in upland review areas that may not impact wetlands, as well as 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.

II. **Recent Trial Court Decisions Discussing Wetlands Jurisdiction**

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)[2]; 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, 30 Conn. L. Rptr. 563 (Oct. 19, 2001)[3] (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

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for, and approval of, activities to be conducted in wetlands or watercourses and (2) apply only to those activities which are likely to impact or affect wetlands or watercourses."

[2] In a related case, our Supreme Court recently upheld an amendment to the definition of "lot and area" in the New Milford zoning regulations which excluded, from the calculation of minimum lot area, wetlands, watercourses and slopes greater than 25 percent. Harris v. Zoning Commission of New Milford, 259 Conn. 402 (2002).

[3] The Appellate Court granted certification in this case on January 11, 2002, A.C. No. 22718. As of early May 2003, oral argument had been held before the Appellate Court but no decision had yet been rendered.

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).

As discussed more in Section IV.C of these materials, two trial court decisions have relied on Queach in affirming the denial of housing proposals based on impacts to the upland habitat of wetland-dependent species.[4] See AvalonBay Communities, Inc. v. Wilton Inland Wetlands, 2002 WL 194535 (Jan. 15, 2002); River Bend Associates, Inc. v. Conservation Commission of Simsbury, 2002 WL 725482 (March 27, 2002). However, certification to appeal in the AvalonBay case was granted and the Connecticut Supreme Court transferred the case to itself, S.C. No. 16807. The court heard oral argument on April 17, 2003. The Appellate Court certified the River Bend case for appeal on June 19, 2002, A.C. No. 23228, and briefing has been completed. Thus, the "reach of Queach" -- at least as it relates to upland habitat preservation -- should be decided shortly.

Three recent Superior Court cases examined other jurisdictional issues involving inland wetlands agencies. In Whitehead v. East Haven Inland Wetland and Watercourses Commission, 2002 Conn. Super. LEXIS 3901 (Nov. 27, 2002) (Radcliffe, J.), plaintiff Niki Whitehead appealed the Commission's decision authorizing the Town of East Haven to conduct river maintenance and flood control activities (such as removal of silt, brush and trees) in the Farm River. Ms. Whitehead owns property abutting the Farm River; however, her property is located approximately five and one-quarter miles downstream from

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[4] Other Superior Court decisions have upheld denials of wetlands applications based on the harm that would be caused to wildlife by activities or adverse impacts directly in the wetlands or watercourses. See, e.g., Charter Development Corp. v. Clinton Inland Wetlands and Conservation Commission, 2002 WL 1456114 (2002); Tartsinas v. Inland Wetlands Agency, 2000 WL 157705 (2000); Plainville NWD Ltd. Partnership v. Town of Plainville Inland Wetlands and Watercourses Commission, 1996 WL 518129 (1996).

the area where the Town proposed to conduct flood control activities. The commission challenged her aggrievement under the wetlands statute, arguing that allowing a person that owns property over 5 miles from the site to appeal would produce an absurd result. The court responded: "The defendant's argument is more properly addressed to the Connecticut General Assembly, than to this court." The court relied on the statutory language providing aggrievement to persons within 90 feet of the watercourse involved in the decision, and held that it is the distance from the *watercourse*, not the property line, which determines whether a person is statutorily aggrieved by a wetlands decision. The court then held that the plaintiff would not have been classically aggrieved based on her mere allegations and generalizations of the danger of pollution, and ultimately dismissed the appeal on the merits, finding no procedural irregularities and that the agency decision was sufficiently supported by the evidence in the record.

In Lewis v. Clinton Planning and Zoning Commission, 2003 Conn. Super. LEXIS 367 (Feb. 13, 2003) (McWeeny, J.),[5] the plaintiff brought an action under the Connecticut Environmental Protection Act, Conn. Gen. Stat. § 22a-16 ("CEPA"), seeking to invalidate the zoning and wetlands permits granted to the Clinton Crossing Premium Outlet Center in 1994. The plaintiff complained that the developer was required to seek amendment to the Town's wetlands map because the wetlands delineation submitted by the developer showed less wetlands on the subject site than the Town map. The court rejected this claim and found that there is no requirement in the wetlands statutes for a wetlands agency to amend its inland wetlands map when it finds, in the course of a permit proceeding, that the actual boundary of a wetland on a particular site is different than as shown on the Town's map.

However, of greater significance was the court's decision to go further and hold that, as a matter of law, the plaintiff could not demonstrate an unreasonable impairment and destruction of wetlands pursuant to General Statutes § 22a-16. Relying on the recent Supreme Court decision in City of Waterbury v. Town of Washington, 260 Conn. 506 (2002), the court held that because the developer "complied with the specific statutory and regulatory provisions regarding permitted activities impacting wetlands, which compliance was determined satisfactory by independent agencies,"[6] its proposed activity could not constitute an *unreasonable* impairment for purposes of CEPA. In City of Waterbury, however, the Supreme Court sent the case back to the trial court to determine whether diversion of water from a river complied with the minimum flow statute and regulations, the answer to which would decide whether or not the diversions were "unreasonable" under CEPA. In this case, the court extended that holding by giving preclusive effect to the very decision being challenged in the case.

The third recent jurisdictional decision of note, Ambrose v. Commissioner of the Department of Environmental Protection, 2003 Conn. Super. LEXIS 651 (March 10, 2003) (Owens, J.), concerned the point at which a municipal inland wetlands agency loses control over an application to the state Department of Environmental Protection. In April 1999, the developer submitted an application to the Seymour Inland Wetlands Commission for development of a single-family residence within a subdivision. The commission discussed the application at meetings in May, July and August, but took no action. In September 1999, the

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[5] Based on the docket number, it appears that this case was originally filed in 1996.

[6] The Connecticut DEP, U.S. Army Corps of Engineers and U.S. EPA had all examined the wetlands boundaries on the site and concluded that the developer's delineation of the wetlands was proper.

developer filed a revised site plan. The commission found that the revised site plan was likely to have a significant impact

on wetlands and scheduled a public hearing for October. The developer's attorney then appeared at the hearing and informed the commission that because it had failed to act on the original application within 65 days, the developer had filed its application with the DEP pursuant to the wetlands statute. However, the developer sought DEP approval of the September 1999 revised site plan, not the original plan. The DEP approved the revised site plan in December 2000. The plaintiff appealed and alleged that the DEP was without jurisdiction to consider the developer's application because the September 1999 site plan contained extensive revisions and therefore constituted a new application for purposes of calculating the time limitations under the wetlands statute. The court agreed, holding that "the broad powers conferred upon municipalities under § 22a-42 include the authority to determine whether a revised site plan, submitted as part of an application, differs from the original site plan so substantially that it constitutes a new application." In the first instance, the court found, it was for the town, not the DEP, to decide whether it was a new application.

III. **Legislation Pending At the State Level**

As of early May 2003, a bill is pending before the Connecticut General Assembly that would change the timing and procedure for consideration and decision on a wetlands application, to be consistent with the timing and procedure for zoning decisions. Substitute Senate Bill No. 1024, which has been given File No. 395 (see attached excerpt), unanimously passed the Planning and Development Committee in April 2003 and was reported to have the unanimous support of the Home Builders Association of Connecticut, Connecticut Planners

Association, Connecticut Conference of Municipalities, and the Connecticut Bar Association's Planning and Zoning Section. The bill would standardize, for zoning, subdivision and wetlands applications, the date a commission officially receives an application; the deadlines for starting and completing hearings and rendering decisions; extensions of these time periods; and the requirements for providing notice to the public, affected property owners, adjoining towns, and the regional planning agency.

IV. **Regulatory Developments in Federal Wetlands Jurisdiction**

There has been a recent flurry of activity at the federal agency level involving the regulation of wetlands under Section 404 of the federal Clean Water Act. Much of this activity (and a great deal of litigation as well) has been touched off by the U.S. Supreme Court decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC") invalidating the Migratory Bird Rule. Over a span of a few weeks in late December 2002 and January 2003, the Bush Administration issued guidance proposing to improve compensatory wetlands mitigation while at the same time proposing to limit the scope of federal jurisdiction over isolated, intrastate wetlands.

A. National Wetlands Mitigation Action Plan

On December 27, 2002, the Bush Administration issued its Interagency National Wetlands Mitigation Action Plan designed to better achieve the existing federal goal of "no net loss" of wetlands. The Action Plan states that it will achieve this goal "by undertaking a series of actions to improve the ecological performance and results of wetlands compensatory mitigation," which "will help ensure effective restoration and protection of the functions and values of our Nation's wetlands . . . ." The Action Plan was developed in response to a report

criticizing the effectiveness of compensatory mitigation issued in 2001 by the National Academies of Sciences' National Research Council ("NAS") and followed on a broad stakeholder gathering in October 2001. It is the result of a coordinated effort among the U.S. Army Corps of Engineers, EPA, Department of Agriculture, Department of the Interior, Federal Highway Administration, and the National Oceanic Atmospheric Administration.

The Action Plan lists several themes that will guide future agency actions, including consultation with states, tribes and interested parties, basing compensatory mitigation on science, and emphasizing accountability, monitoring and follow-through. An interagency team will be set up to guide the development and implementation of the 17 action items set forth in the plan.

The first action item, clarifying recent mitigation guidance, has already been accomplished and is discussed below. The remaining action items are broken down into several categories:

- Integrating compensatory mitigation into a watershed context by developing guidance on, among other things, the use of on-site versus off-site mitigation and the use of vegetative buffers;

- Improving compensatory mitigation accountability through new guidance on the feasibility of certain mitigation measures;

- Clarifying performance standards by adapting the NAS recommended guidelines for creating or restoring self-sustaining wetlands; and

- Improving data collection and availability with a shared mitigation data base and an annual public report card on compensatory mitigation.

B. Compensatory Mitigation Guidance

Also on December 27, 2002, the Corps of Engineers released its Regulatory Guidance Letter ("RGL") No. 02-2, entitled "Guidance on Compensatory Mitigation Projects for Aquatic

Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899." The RGL, which implements one of the items in the Action Plan discussed above, applies to all compensatory mitigation proposals in connection with permit applications filed after December 27, 2002 and supersedes RGL 01-1 issued October 31, 2001. The stated purpose of the RGL is to support the national policy of "no overall net loss" of wetlands and to reinforce the Corps commitment to protecting wetlands while allowing permittees to provide appropriate and practicable mitigation for authorized impacts to aquatic resources.

The most important change effected by the RGL is its shift in the Corps' mitigation policy from requiring strict acreage replacement to an increased reliance on replacing wetlands functions. As a result, the "no overall net loss of wetlands" goal may not be achieved for each and every permit decision, rather the Corps intends to achieve this goal on a cumulative basis.

Where there is an absence of definitive information on the functions of a wetland, the Corps will still use acres as the standard measure for determining wetlands impacts and required mitigation. However, the RGL instructs Districts wherever possible to use a "functional assessment method." Given the unique ecological characteristics of each aquatic site, the RGL states that focusing on replacement of the functions provided by a wetland, rather than simply the acreage lost, will more effectively enhance environmental performance. Under this approach, Districts will assign scores to particular functions using assessment techniques generally accepted by experts in the field, the best professional judgment of federal, tribal and state agency representatives, and the Section 404(b)(1) Guidelines. Fortunately, the RGL requires that the District make its chosen assessment method available to applicants.

The Corps' mitigation objective under the RGL is to provide, at a minimum, one-to-one functional replacement, or "no net loss of functions." This may be achieved in some cases by replacing a wetland with a smaller wetland, where the replacement wetland is of higher function.

As mitigation alternatives, applicants may propose the use of mitigation banks, in-lieu fee arrangements, or separate-activity specific projects. The four types of wetland projects available under the RGL are familiar: creation of a new wetland; restoration of a former wetland or a degraded wetland; enhancement of specific functions; or preservation by the removal of a threat to, or preventing the decline of, wetland conditions. As part of specific wetland projects, Districts may require on-site or off-site mitigation; in-kind or out-of-kind mitigation; or buffers.

The Corps will be making mitigation plans for individual permits available for public review and comment. As always, pre-application consultation is recommended to discuss compensatory mitigation proposals with the Corps prior to filing. Since compensation is the last step in the Corps' sequencing guidelines, the RGL states that Districts should not require detailed compensatory mitigation plans until they have established "the unavoidable impact"; or, to put it more bluntly, reducing your impacts may reduce your mitigation.

A compensatory mitigation plan must contain the following components: baseline information concerning the impacted resources, goals and objectives for the mitigation plan, the factors considered in site selection, written specifications and work descriptions, performance standards, the parties responsible for compliance, description of the legal means for protecting mitigation areas, contingency plans for unanticipated site conditions or changes,

monitoring and long-term reporting plans, and financial assurances and contingency funds set aside for remedial measures. The level of information provided in a mitigation plan "should be commensurate with the potential impact to aquatic resources."

While it may never be possible to determine whether the Corps has achieved its goal of no net loss of wetlands functions, most interested parties should be encouraged that their government will now be evaluating wetland mitigation proposals based upon scientific factors rather than a mere bean-counting of acres. Of course, from the applicant perspective, whether this new approach will add further expense and delay to an already cumbersome process remains to be seen.

C. Proposed Rule Making on Federal Wetlands Jurisdiction

On January 15, 2003, the Corps of Engineers and EPA published in the Federal Register, 68 Fed. Reg. 1991, an Advance Notice of Proposed Rule Making ("Notice") seeking comments on the scope of "waters of the United States" subject to the Clean Water Act ("CWA") in light of the SWANCC decision. In that case, the Supreme Court held that the Corps exceeded its regulatory authority under the CWA by asserting jurisdiction over isolated, intrastate, non-navigable waters based on their use as habitat for migratory birds pursuant to the "Migratory Bird Rule."

Published in 1986, the Migratory Bird Rule is actually not a "rule" at all. Rather, in the preambles to their regulations defining "waters of the United States" under the CWA, the Corps and EPA provided examples of the types of links to interstate commerce which might serve as a basis for CWA jurisdiction over intrastate waters. These included use of waters: (1) as habitat by birds protected by migratory bird treaties or which cross state lines; (2) as

habitat for endangered species; or (3) to irrigate crops sold in commerce. The EPA and Corps now acknowledge that these bases for asserting jurisdiction were eliminated by the SWANCC decision. However, the regulations, 33 C.F.R. § 328.3(a)(3), also enumerated other factors supporting federal jurisdiction over isolated, intrastate, non-navigable waters:

(i) Use of the water by interstate or foreign travelers for recreational or other purposes;

(ii) the presence of fish or shellfish that could be taken and sold in interstate commerce; or

(iii) the use of the water for industrial purposes by industries in interstate commerce.

The Notice therefore solicited comment from the public as to whether, and under what circumstances, the three factors listed above (or any other factors) provide a basis for CWA jurisdiction over isolated, intrastate, non-navigable waters. The Notice also solicited comment on whether the CWA regulations should define "isolated waters," and if so, the factors to be considered in determining whether a water is or is not isolated for jurisdictional purposes. Finally, the Notice seeks information regarding the resource impacts to wetlands and other waters that may be affected by the issues raised by the Notice. Comments or information in response to the Notice were required to be submitted by March 3, 2003.

Along with the Notice, the Corps of Engineers and EPA issued a Joint Memorandum, signed by their general counsel, providing clarifying guidance regarding federal wetlands jurisdiction in the wake of SWANCC. The Joint Memorandum states that in light of SWANCC, field staff of the two agencies should not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis for asserting such jurisdiction rests on any of the factors listed in the Migratory Bird Rule. In addition, field staff are directed to seek formal, project-specific headquarters approval prior to asserting jurisdiction over such waters based on any of the three grounds listed in 33 C.F.R. § 328.3(a)(3)(i)-(iii), as discussed above. However, field staff are instructed by the Joint Memorandum to continue to assert jurisdiction over traditional navigable waters and their adjacent wetlands and, generally speaking, their tributary systems and adjacent wetlands.