Journey to the Legal Horizon

The Greatest Hits of the First Decade of the 21st Century

The Editor of the Habitat has asked me to write an article based on my blog entries "Countdown to 2010: Five Most Significant Acts in the Past Decade (December 27 - 31, 2009). I included a DEP act (Model Regulations), court cases, and a legislative response to a court case.

I don't intend to look backward into the details of each case. If you are new to this job or want to understand the details of those cases, you can check out the blog posts (see URL listed at end of article) or articles in previous *Habitat* issues (available at caciwc.org.) This article will focus on how you will go about your duties, informed by the cases and the statutory sections list in the article. These cases, in the order listed below, will guide you in thinking about: jurisdiction over regulated activities; denials to permit applications; consideration of wildlife; denials based on lack of adequate information.

Prestige Builders, LLC v. Inland Wetlands Commission,
79 Conn. App. 710 (2003), cert. denied, 269 Conn. 909 (2004):

You need to be very familiar with your agency's definition of "regulated activity." The first think I do when representing a client before a wetlands agency that I haven't previously appeared before is look for a copy of the wetlands regulations online and go straight to the definition of "regulated activity." How large is the upland review area and has the agency reserved its authority, *in a regulation,* to examine effects on wetlands and watercourses from activities outside the upland review area. *Has your agency reserved its right to examine the effects on wetlands and watercourses from activities outside the upland review area? You need to know that answer.* If the answer is yes, you will be fully prepared when an applicant or should-be applicant contests your agency's authority to inquire about activities occurring beyond the upland review area. If the answer is no, you will proceed cautiously. Even if the applicant doesn't challenge, at a wetlands meeting, your (lack of) authority to examine these upland activities, it doesn't mean the applicant won't raise it in a court appeal.

There are court appeals pending currently that seek to overturn the holding that an agency must first adopt a regulation reserving its authority to regulate activities beyond the upland review area. The Supreme Court, which can overrule the Appellate Court, hasn't weighed in on this issue and the Appellate Court says you need the regulation. The Appellate Court case is binding on all wetlands agencies. (Now, a reminder from my article in the last issue: has your agency considered amending its regulation to regulate activities wherever they occur?)

River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission,
269 Conn. 57 (2004)

Once you are grounded as to your agency's jurisdiction, you will consider the strength of the factual, scientific evidence when contemplating voting to deny a permit. The "possibility" or "potential" to harm a wetlands or watercourse is simply not sufficient, or in the lingo, doesn't constitute "substantial evidence" to deny a permit. Members of the public or even members of your agency can be *concerned* about the potential impact on a wetland. But the agency's concern alone, is not a valid basis to deny a permit.

Your agency review of an application is looking to determine whether the proposed activity will cause an adverse impact to a wetland or watercourse. It will also not be sufficient to rely on a scientific opinion that concludes, for instance, that pollutants in the stormwater, will pollute wetlands or a watercourse. There will have to be further scientific opinion that the specific pollutants in that quantity will have an *actual* adverse impact on the resource. Scientific studies about the Mississippi River, on their own, will not be sufficient. You will always be looking for the experts who connect the dots: pollution, in general [how the pollution control is designed to work] + expert opinion based on the site [what the effect on the wetlands will be when x amount of pollution is received in the rain water] = actual adverse impact.

AvalonBay Communities, Inc. v. Inland Wetlands Commission, 266 Conn. 150 (2003); Legislative enactment creating General Statutes § 22a-41(c) and § 22a-41(d):

The decade soon saw seemingly seismic upheavals by the Supreme Court in 2003 in its pronouncement about consideration of wildlife. By 2004 the legislative had calmed the waters by enacting § 22a-41(c) which expressly states that wetlands and watercourses "includes aquatic, plant or animal life and habitats in wetlands or watercourses." When you are considering impacts on wildlife your focus will be on where the proposed activity is occurring. Why? Because your authority to base a permit denial or permit condition from wildlife impact depends on it. That's different from how you otherwise evaluate applications. You get to impose permit conditions to protect the resources whether the activity will occur in the wetlands or in the upland review area. But not with wildlife. You must first determine where the activity is occurring (wetlands vs. upland review area). Next, if occurring in the upland review area, in order to deny an application or impose a condition based on wildlife, you will first have to find an impact on the physical characteristics of the wetlands or watercourse.

If you are new to your agency, it's more important to focus on the language in the statute, enacted in 2004, than understand what the Supreme Court said in 2003 about wildlife and how the legislature, in part, overturned the decision and, in part, affirmed it. The statutory language on wildlife controls your agency's actions -- *whether your agency has incorporated those changes into your regulations or not.* Why do I point this out? Because I have appeared before two agencies in the past year which have not changed their regulations to reflect the changes in the law.

Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93 (2009):

As you consider what impact a proposed activity will have on wetlands and watercourses, you can require the submission of information on the impact to plant and animal life *even outside the*

wetlands. That preliminary information will shape your determination of whether the application will have an adverse impact on wetlands and watercourses. The applicant won't be able to rely on its own assessment that the activities pose no impact and refuse to submit wildlife information.

Concluding thoughts

I think there is a consensus that agency denials underwent far more scrutiny and were overturned more often in the 2000s than in previous decades. It would be mistaken, however, to look at the smackdown by the Supreme Court of the denial in the *River Bend* case in 2004 and see a different trend emerging from the victory awarded by the Supreme Court to the agency in 2009 in the *Unistar* case. The *RiverBend* case was a denial based on the merits -- all of the expert reports and opinions. The *Unistar* case was a denial based on the applicant's refusal to submit information requested by the agency. The next phase will be for agencies to take the *Unistar* data, once it is submitted, and craft a denial, when warranted, by carefully connecting the dots between the necessary expert opinions.

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