

Journey to the Legal Horizon

In this article I depart from my customary format and engage in a dialog with Ed Pawlak of Connecticut Ecosystems LLC reflecting on his article in this issue about gathering data on rare species. We hope you find it informative.

Janet: You mention that the DEP database, known as the Natural Diversity Data Base (NDDDB), is expanded as new information is available. How accessible is that database? Is it hard to use?

Ed: Now that the DEP has placed the NDDDB maps on the DEP website, it is very easy to access them. The NDDDB is a compilation of all known current and historic listed species (Endangered, Threatened, Special Concern) records and natural communities. To determine whether there are any NDDDB records on or near a subject property, go to the following web site: http://www.ct.gov/dep/cwp/view.asp?a=2702&q=323464&depNav_GID=1628&depNav= Click on "View Maps by Town" at the bottom of the page. Choose the town from the drop down menu, then click "Go". Click "Download Map" on the next page (note the date when the map was last updated). This will bring up a USGS topographic quadrangle map that includes the town of interest. Click the "+" button on the toolbar at the top of the page to zoom in on the map. You will note that road names are visible at a high magnification, which will enable you to locate the property of interest (see enclosed sample map).

The gray-shaded polygons on the map indicate the presence of one or more current or historic listed species records, or natural communities, somewhere inside the polygons. The exact location of a listed species record is not disclosed on the maps to discourage illegal collecting. In order to learn more information on the record(s), go to the following web site: http://www.ct.gov/dep/cwp/view.asp?a=2702&q=323466&depNav_GID=1628&depNav= Click on either "Word" or "PDF". These files contain background information on the NDDDB program, along with the request form that must be filled out and mailed to CTDEP. The CTDEP will reply with information on the species record(s) on or near the property of interest. An NDDDB review is required for regulated activities that require State permits, projects that use State funding, and activities performed by the State. It is recommended as part of a standard review of any development project.

Ed: (continuing) Once a listed species is found within a wetlands or watercourse in a proposed project area is that information alone sufficient to deny a wetlands application?

Janet: No. What we learned from *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57 (2004) is that there must be evidence of actual adverse impact. A "concern" about the species' fate is not likely to be sufficient. With regard to a listed species that exists on a site, the question is: *is there expert opinion in the record that "connects the dots" between the species and adverse impact to it at that site?* If there is no adverse impact to the species or if mitigation can eliminate that impact, the existence of the species at the site won't be an obstacle to granting a permit.

Ed: Let's say there is a documented listed species on a property proposed for development. Does a wetlands agency need to give this more weight than it would a more common, unlisted species?

Janet: Not necessarily. That's because of the unique way in which wildlife is considered by wetlands agencies. We need to look at sections 22a-41(c) and 22a-41(d) of the General Statutes. (If your agency's regulations track the DEP model regulations, you'll find them in sections 10.5 and 10.6 of the regulations.) Section 22a-41(c) instructs us that animal and plant life is included in the definition of wetlands and watercourses. However, section 22a-41(d) limits wildlife consideration when the proposed activity is outside of a wetland or watercourse. An agency can't deny an application or impose conditions in granting a permit on the basis of wildlife *"unless the proposed activity will likely impact or affect the physical characteristics of such wetlands or watercourses."*

If the regulated activity is proposed in a wetland or watercourse, the agency can deny or condition a permit because of actual adverse impact to wildlife, listed species or unlisted.

The other scenario occurs when the proposed activity is in the upland review area. Then we're in a situation where section 22a-41(d) applies, because the regulated activity is not sited in a wetland or watercourse. Even if the proposal threatens to eliminate the entire endangered species population, whether three individuals or three thousand, the wetlands agency *can't* deny the application or place conditions in a permit because of a likely impact on the wildlife *unless* there is evidence that the proposal will likely impact the physical characteristic of a wetland or watercourse.

Ed: If a wetlands agency finds that there will be a likely impact to the physical characteristics of a wetland or watercourse as a result of a regulated activity outside of wetlands and watercourses, then are they free to consider any likely impact to plants and wildlife across the property, not just those that occur in the wetland/watercourse that will be physically impacted? Or can they only focus on the plants/wildlife that occur in the wetland/watercourse that will be physically impacted?

Janet: That precise case hasn't yet been decided by the Supreme Court. But there is some Supreme Court guidance from the *Unistar Properties, LLC*¹ case. The court concluded that a wetlands agency may request information about wildlife in the upland review area and beyond *because the effect of development on the wildlife in those uplands may affect the physical characteristics of wetlands or watercourses*. The court did also warn that if an agency sought wildlife information from an area so remote as to be unlikely to cause an effect on wetlands or watercourses, the agency action would be arbitrary and capricious -- that is, illegal.

In a case released this summer, the Appellate Court affirmed the denial of a golf course and houses in a coastal forest by the Old Saybrook wetlands agency. In *River Sound Development, LLC v. Inland Wetlands & Watercourses Commission*, 122 Conn. App. 644 (2010) the court upheld the agency's denial based on the fact that the loss of wood frogs would have a negative consequential effect on the physical characteristics of the wetlands. The court did not identify or distinguish whether the wood frog is a listed species.

Ed: (It is not.)

Janet: The court went through an elaborate explanation how an adverse effect on the physical characteristic of the wetlands would come about. Relying on and quoting Michael Klemens, *the applicant's expert*, the court pointed out the substantial evidence to support that conclusion: "the wood frogs remove a lot of the detritus in the pools. The leaves' energy is transported through the wood [frog] tadpoles . . . the actual quality of the water, physical parameters of the water, are affected by wood frog tadpoles." ⁱⁱ

Counsel for the Town of Essex, an environmental intervenor in the application which actively participated in the public hearings before the Old Saybrook wetlands agency, relied on a footnote the Supreme Court's decision in *AvalonBay Communities, Inc. v. Inland Wetlands Commission*, 266 Conn. 150, 163 n. 19 (2003) to argue its case about the wood frogs. The court in *AvalonBay* held that wildlife was not within the jurisdiction of wetlands agencies, with one stated exception: "There may be an extreme case where a loss of or negative impact on a wildlife species might have a negative consequential effect on the physical characteristics of a wetland or watercourse, but that is not the situation in the present case." In talking to the counsel for the Town of Essex I learned that there were hundreds of documented wood frog tadpoles in the Old Saybrook application. In the *AvalonBay* case there were only a handful of documented salamanders.

Ed: Do you mean that the size of the population matters in every instance when wildlife is considered?

Janet: No. In *River Sound*, the argument was made that the wood frogs constitute that "extreme example" where the loss of wildlife will have a negative consequential affect on the physical characteristic of a wetland. Since the legislature amended the wetlands statute -- in the 2004 legislative session that followed the fall 2003 issuance of the *AvalonBay* case -- *any* likely impact or effect on the physical characteristics of wetlands or watercourses from the proposed activity is sufficient to authorize a wetlands agency to deny or condition a permit because of a likely effect on wildlife. It is not necessary that the physical effect on the wetlands or watercourses result from an impact to wildlife.

Ed: So, the impact to the physical characteristics of the wetland or watercourse can come from activities unrelated to wildlife impacts, such as erosion during construction or elevated water temperatures due to tree clearing around the wetland/watercourse. Right?

Janet: Exactly. The Old Saybrook wetlands agency's denial was upheld based on the evidence in the record that the loss of the wood frog tadpoles will likely impact the physical characteristic of the vernal pools. The agency could have relied on, *if there was expert evidence in the record*, siltation from construction activities, for example. In order to establish this "extreme case" (based on the footnote in *AvalonBay*) I believe the number of tadpoles was relevant. It's not at all clear that the loss of a handful of wood frog tadpoles would bring about the same physical effect on the physical characteristics of the vernal pool.

Ed: Let's say there is a confirmed box turtle population on a property (Species of Special Concern). This is a facultative wetland user that mostly is found in well drained upland habitats. Can a wetlands agency deny a permit on this property due to box turtle impacts? There are many

listed plant and wildlife species that are not obligate wetland users (e.g., bobolinks, sandplain insects, etc.).

Janet: To begin, we would need to know whether the proposed activity will occur in the wetlands or in the upland review area and beyond. If the activity will occur in a wetland, then the agency may base a denial on an impact to the confirmed box turtle population *or any other confirmed animal population -- if there is substantial evidence (expert opinion) of a likely actual adverse impact to the species.* If the proposal occurs in the upland review area or beyond, the agency first must determine if there are likely effects or impacts on the physical characteristics of the wetlands or watercourses. Is this how a wildlife biologist would consider impacts to wildlife? No, but it *is* how a wetlands agency should consider the evidence.

A biologist may rate an endangered species more highly than a common one. The wetlands law does not. The wetlands law does allow the agency broad latitude in considering wildlife, including unlisted species, when the regulated activity will occur in wetlands and watercourses, but constrains that consideration when the activity is not.

Similar to other provisions in the wetlands law, the consideration of wildlife is not "intuitive." It's not what "feels" important that counts. Which path does the wetlands law dictate the agency follow? If it is the constrained path, the record must contain substantial evidence that the impact will likely negatively impact the physical characteristics of the wetlands. The *River Sound* case is one example of how an agency's consideration of wildlife impacts was upheld. It will probably take another generation of court cases to work out the wrinkles in the 2004 legislative amendment.

Janet: Here are two take-away points:

- The wetlands law is egalitarian. Adverse impacts to wildlife, listed species or not, can be the basis to deny or condition a permit when the regulated activity occurs in a wetland or watercourse. Conversely, when the regulated activity occurs outside a wetland or watercourse, adverse impact to wildlife, listed species or not, that are found in a wetland or watercourse cannot be the basis to deny or condition a permit *unless* the regulated activity will likely impact the physical characteristics of a wetland or watercourse.
- Recent case law affirms that, with enough expert evidence in the record, a wetlands agency can successfully base a denial of a permit for an activity occurring outside of a wetland on the loss of wildlife that in turn will cause a physical impact to a wetland.

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ⁱ *Unistar Properties, LLC v. Conservation & Inland Wetlands Commission*, 293 Conn. 93 (2009). For readers who wish to read the case online, I have written blog entries about two online methods that can be used to find Connecticut cases. See entries of January 29, 2010 and February 3, 2010 on my blog at www.ctwetlandslaw.com.

ⁱⁱ *River sound Development, LLC v. Inland Wetlands & Watercourses Commission*, 122 Conn. App. 644, 655 (2010). The *River Sound* case and the *AvalonBay* case are hyperlinked in the July 30, 2010 blog entry.