Journey to the Legal Horizon

Expert Opinion - Too Narrow or Too Broad?
Fort Trumbull Conservancy, LLC v. New London, 135 Conn. App. 167 (2012)

The role of the expert and expert opinion occupies a central role in the consideration of a wetland application. Experts weigh in for applicants, environmental intervenors and in third party reviews for the agency. While some may argue that the process now requires everyone to "lawyer-up," I believe the case law is leading most parties to "expert-up." A recent case from the Appellate Court articulates the weakness of expert opinion when the scope of the expert's review is either too narrow or too broad. The Appellate Court ruled in *Fort Trumbull Conservancy, LLC v. New London*[i], held that neither opinion of two experts met the burden of proof which the environmental organization had to satisfy under the Connecticut Environmental Protection Act.

In this column we are examining a case that does not arise out of a wetlands agency proceeding, or any other land use proceeding. We will not focus on the legal proceeding and certain procedures only available to a judge in a court action, but on the pivotal role of expert opinion -- as the Conservancy ultimately lost its case based on the lack of satisfactory expert opinion.

I will take at face value, and I suggest that you do, too, how the Appellate Court characterizes the expert testimony and opinion. That is, it will not be useful for you to delve into what either of these experts actually did testify to, to determine if the Appellate Court was accurate. From this point forward the only characterization of the experts' opinion that matters is the court's.[ii] It can't be known from reading the case whether the scope of the experts (1) was limited by each of the expert's belief that the narrowness or broadness was appropriate, (2) was limited by what the lawyer asked for, or (3) a combination of the two. We will only focus on why the Appellate Court upheld the trial court judge's decision, which dismissed the organization's lawsuit based on the lack of expert opinion to support the allegation reasonable likelihood of unreasonable pollution to the Thames River.

<u>What the Trial Court Did</u>

The Fort Trumbull Conservancy, LLC ("Conservancy") brought a lawsuit based on the same law which allows environmental intervenors to participate in wetlands agency proceedings. Without discussing the differences in bringing a direct court action, in the lawsuit the Conservancy alleged that the New London Development Corporation was implementing a storm water management plan on a 45 acre parcel that was reasonably likely to unreasonably pollute the Thames River. At trial the Conservancy offered two experts to substantiate this claim, one a retired biology professor, the other an environmental consultant.

Although the Conservancy argued it wasn't required to present expert opinion to prove its case, the trial court and Appellate Court quickly dismissed that notion, relegating it to a footnote. The specific allegations in the Conservancy's complaint included: the "deposition on the property and in the Thames River and waterbodies of at least eighteen contaminants and/or pollutants

including but not limited to heavy metals and [polycyclic aromatic hydrocarbons that would] enter the soil, groundwater and surface water . . . and will be transported via storm water from the property to other sensitive receptors away from the property. . . *As the [trial] court rightly concluded, those claims involved issues beyond the field of ordinary knowledge and experience of the trier of fact, necessitating expert testimony thereon."*[iii]

Here's what the biology professor testified to. He examined the life forms in the river and a creek near the storm water system outfalls. He sampled and had analyzed a few sediment samples. His objective was to describe the existing conditions and overall health of the river. He testified that it wasn't his job to determine the source of the pollution. He concluded that the river and two related water bodies were degraded.

The environmental consultant's objective was to determine the level of contaminants in the storm water of the 45 acre property in question. He studied the storm water in an area of 312 acres which flowed through the subject property's 45 acres. He acknowledged that the total storm water which flowed through the storm water management system was even larger than the 312 acres. He extrapolated from a 1970s traffic report making certain assumptions to predict contamination leaving the 45 acre site. It came out that he didn't test the storm water entering or exiting the system. He didn't consider the contribution of sources, such as other untreated outfalls, marinas and that the river was an impaired waterbody under federal law. He criticized the Vortechnic system used, although conceding that it was better than nothing. The traffic report and his extrapolations did not account for the improvements in car technology. He said that no other scientist had used his methodology. Further, he testified that he didn't care about jurisdictional boundaries under the law, that the natural system was blind to such limits.

The trial court dismissed the Conservancy's case finding that the opinions of the experts were not sufficient to establish that the Development Corporation caused pollution, let alone unreasonable pollution to the river. To begin, neither expert testified to or was asked whether their opinions were based "on reasonable probability, reasonable certainty or any other standard which resembled a probability."[iv] Next, there was no testimony that linked actual or potential pollution, such as the contamination in the sediment samples, to the Development Corporation's activities. It's what I call "connecting the dots." It's what the court calls "proximate cause." The Conservancy argued that it was "under no obligation to show what is going into the . . . system or even that actual pollution is coming out. . . . it is irrelevant . . . that the pollution is also caused in part . . . by storm water flowing from areas outside the [area]." The trial court and Appellate Court disagreed. Proof of pollution in the general area is not sufficient. If it was beyond the scope of the biology professor's review, it was incumbent upon the Conservancy to present another expert to make that connection. Finally, the trial judge dismissed the environmental consultant's methodology, stating that "in the testing, the selection of testing methods, the selection of testing sites, the decision not to test the water on the way in or out of the Vortechnic systems all make the court conclude that his testimony has no reasonable scientific basis."[v]

<u>What Your Wetlands Agency Can Do</u>

There are lessons from this case that can be applied to expert testimony before wetlands agencies. This is not limited to environmental intervenors who will be making allegations

similar to those made by the Conservancy in its lawsuit. It holds equally for an applicant claiming to cause no harm or the expert conducting a third-party review for the agency. Like the trial judge, the agency is the finder of fact. The agency is not obligated to accept the reports and test results of an expert.[vi] Yet the agency can't "capriciously" ignore an expert[vii] and certainly not the sole expert on a topic. How can you not act capriciously? By routinely and methodically questioning experts who appear before the agency:

- Ask the expert to articulate how certain or how probable his/her opinion is.
- If Expert A states that a pollutant will end up in the water body, can Expert A also connect that pollutant to the applicant's activities? If not, is there an Expert B? If the pollutant ends up in the water body, is there an Expert C who can state that the pollutant in that amount constitutes an adverse impact?
- Is the expert testifying within the area of his/her expertise? You will only know by asking the expert's field of study and work in that field. Is the engineer testifying about a topic that requires a biologist ("the construction of this impoundment won't harm the aquatic life") or is the biologist testifying about a topic that requires an engineer ("this system can be reconfigured to allow the passage of aquatic life")
- If Expert X says s/he draws conclusions from a unique testing methodology, ask for explanations of how the methodology was arrived at, what other experts agree with the chosen methodology, why standard methods weren't employed.

As the "trier of fact," the agency has latitude to reject expert testimony, if not done capriciously. The consideration of expert opinion continues to be a major reason for agency denials to be reversed on appeal. Identifying the limitations of an expert's background, methodology or scope of review -- *and doing so on the record* -- are ways to bolster the agency's decision-making process.

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[i] You can read the case on the Judicial Website at: http://www.jud.ct.gov/external/supapp/Cases/AROap/AP135/135AP321.pdf. Or go to: www.jud.ct.gov, click on Opinions, click on Supreme Court Archives, click on 2012, scroll down to "published in the Connecticut Law Journal of 5/1/12, click on the case.

[ii] I write this digression because at one of the legal workshops at the 2011 CACIWC annual meeting, an environmental consultant made an impassioned plea and persuasive pitch that the Appellate Court had taken a portion of his report out of context and had mischaracterized his opinion. I was conducting that workshop with Assistant Attorney General David Wrinn and Attorney Mark Branse. Each of us responded that we "felt his pain," adding our examples of how the Supreme Court or Appellate Court had overlooked written arguments that we had made. Regardless of how foolish or inadequate (or worse) such a court opinion might make us feel, we are no longer free to argue "but that's not the way it was, I did make that argument."

[iii] (Emphasis added.) *Fort Trumbull Conservancy, LLC v. New London,* 135 Conn. App. 167, 183 n.11 (2012).

[iv] *Fort Trumbull Conservancy, LLC v. New London,* 135 Conn. App. 167, 174 (2012).

[v] *Fort Trumbull Conservancy, LLC v. New London,* 135 Conn. App. 167, 189 n.14 (2012).

[vi] *AvalonBay Communities, Inc. v. Inland Wetlands and Watercourses Agency*, 130 Conn. App. 69, 80 n.17, cert. denied, 303 Conn. 908 (2011).

[vii] *AvalonBay Communities, Inc. v. Inland Wetlands and Watercourses Agency*, 130 Conn. App. 69, 81 n.18, cert. denied, 303 Conn. 908 (2011).