Journey to the Legal Horizon

The Connecticut Environmental Protection Act is amended: Public Act 13-186[i]
In the "land of steady habits," don't expect a lot of changes.

After a number of failed attempts in the past few legislative sessions, the General Assembly passed a law amending the Connecticut Environmental Protection Act (CEPA). The status quo prevails! Am I being facetious? Hardly. The General Assembly codified (put into statute) the holding of the Connecticut Supreme Court's 2002 decision in the *Nizzardo* case, which in turn affirmed the Connecticut Supreme Court's 1984 decision in *CFE v. Stamford*.

Review of CEPA

Let's remind ourselves of the elements of CEPA. It is supplementary to other environmental laws. So, a wetlands agency begins its duties by implementing the state wetlands act. CEPA only applies *when invoked*. For our discussion[ii], we are concerned with the authority granted under CEPA to allow "anyone," broadly defined, to intervene in "administrative proceedings" where conduct is proposed which is "reasonably likely to have the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." Such intervenors are sometimes referred to by the statutory section, "section 22a-19 intervenors," or "environmental intervenors," or simply "intervenors."

CEPA is invoked upon the filing of a "verified pleading." A "verified pleading" is simply a written statement in which the intervenor asserts that the proceeding "involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." "Verified" means the intervenor has sworn to truth of the allegations, in the presence of a notary public or attorney, whose signature is also included. The intervenor does not have to prove the truth of the allegations in the petition in order to intervene. How much the intervenor has to allege in the verified pleading is the subject of the amendment.

The intervenor becomes a party to the proceedings. As a party the intervenor may put on evidence to prove the allegations of unreasonable conduct, to rebut the applicant's presentation and may cross-examine the applicant or their representatives. It is not the applicant's duty to characterize the conduct, if the intervenor does not offer any expert evidence on the pollution, impairment or destruction. It is not the agency's job to investigate the intervenor's claims. The agency has the duty of "considering" the alleged unreasonable conduct. If an intervenor is successful at proving the harmful effect of the proposed conduct, the agency is not authorized to approve the application as "long as there is a feasible and prudent alternative." The intervention process starts with a sworn statement alleging unreasonable conduct to a natural resource. It ends with the agency determining whether there is proof of the unreasonable conduct, and if so, whether there is a feasible and prudent alternative to the proposal.

The amendment to CEPA

The amendment adds the following language to § 22a-19, by numbering the existing language in § 22a-19 as subsection (1) and creating the following subsection (2):

"The verified pleading shall contain specific factual allegations setting forth the nature of the alleged unreasonable pollution, impairment or destruction of the public trust in air, water or other natural resources of the state and should be sufficient to allow the reviewing authority to determine from the verified pleading whether the intervention implicates an issue within the reviewing authority's jurisdiction. For purposes of this section, 'reviewing authority' means the board, commission or other decision-making authority in any administrative, licensing or other proceeding or the court in any judicial review."

In *Nizzardo v. State Traffic Commission*[iii] the Supreme Court affirmed the 1984 decision in *CFE v. Stamford*, holding that CEPA does not expand the jurisdiction of the agency the intervenor appears before. If a wetlands agency has no jurisdiction over air, as in the *CFE v. Stamford* case, an intervenor is not authorized to use CEPA to expand the jurisdiction of the agency. The *Nizzardo* court explicitly imposed certain requirements in the verified pleading, as follows:

"(A) petition for intervention filed under § 22a-19 must contain specific factual allegations setting forth the environmental issue that the intervenor intends to raise. The facts contained therein should be sufficient to allow the agency to determine from the face of the petition whether the intervention implicates an issue within the agency's jurisdiction."[iv]

If you compare the amendment to CEPA with the quote from the *Nizzardo* case (which I did), you will discover that the amendment incorporates the quote virtually verbatim, except for the last sentence of the amendment. The last sentence which defines "reviewing authority" is not derived from the court decision.

What the court determined was that it is not enough to just state (and that's why I put a strike-through in the statement): "~~the conduct proposed will or is reasonably likely to have the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.~~" If a petition states that, it ought to go on to state, something like the following: ". . . by disturbing the upland directly adjacent to the wetland boundary, erosion of the upland will likely result in the deposition of materials in the wetlands and _____ River which will unreasonably impair the wetland and river and unreasonably diminish the wetlands' ability to provide flood control, etc., etc."

The Connecticut Business and Industry Association (CBIA) stated on its website that the public act "should cut down on frivolous interventions in permit proceedings."[v] That might have

been true, if this public act had changed the law. Since the legislature is merely playing "catch-up" to the judicial decision of 2002 -- which has been in effect for over a decade -- we're not likely to see any change in verified petitions that are accepted by agencies. What we will more likely see if that citizens who create their own intervention petitions, without the use of attorneys -- *which they have every right to do* -- will not have their initial verified petition rejected by an agency which had its town attorney review the petition.

If you believe that government should be transparent, you will appreciate how this amendment makes it easier for citizens to know what the court standard is upon first reading the statute. The process to enact this amendment was anything but transparent. The purpose stated on the original bill was: "To require certain legal entities that fund environmental interventions to disclose their identity when funding an intervention in an administrative, licensing or other proceeding involving a business competitor."[vi] That never happened. The Planning and Development Committee, where the bill originated, communicated that the bill was just a "placeholder" so the groups and individuals testifying or submitting letters at the public hearing on the bill talked about their own concerns about CEPA. Some suggested time limits on the right to intervene, others wanted no right to intervene in a court appeal if the person/entity hadn't intervened in the agency proceeding.

In the end, the legislature just incorporated the wording of the court decision into CEPA. For most of us, it's still "business as usual." It is now clear to any citizen reading the amendment what is expected of them. Carry on -- stay the course.

Janet P. Brooks practices law in East Berlin. You can read her blog at: www.ctwetlandslaw.com and access prior training materials and articles at: www.attorneyjanetbrooks.com.

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[i] You can read the public act by pasting in the following URL into your browser: http://www.cga.ct.gov/2013/ACT/pa/pdf/2013PA-00186-R00SB-00814-PA.pdf

[ii] CEPA also provides a right to proceed directly to court in a legal action against the party who is claimed to be creating unreasonable pollution, impairment or destruction of natural resources of the state. See Connecticut General Statutes § 22a-16.

[iii] *Nizzardo v. State Traffic Commission*, 259 Conn. 131 (2002). The case can be read by putting this URL into your browser: http://www.jud.ct.gov/external/supapp/Cases/AROcr/259cr131.pdf. You can also get there by googling: CT Supreme Court case Nizzardo. The CT Judicial Branch's online version (the URL in the previous sentence) appears as the first URL.

[iv] *Nizzardo v. State Traffic Commission*, 259 Conn. 131, 164-65 (2002).

[v] Reported on the website of the Connecticut Business and Industry Association at: http://gov.cbia.com/issues_policies/article/environment-regulatory-changes-reforms, accessed on June 25, 2013.

[vi] http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Public+Act&bill_num=186&which_year=2013.