Journey to the Legal Horizon

Results of 2013 Statewide Survey
of Municipal Wetlands Regulations:
Upland Review Areas, Vernal Pools and Vegetated Buffers

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For the past decade I have offered a variety of workshops at CACIWC's annual meetings. Usually I choose a topic – or it chooses me, based on a court case or an issue that reflects the pulse of wetlands regulations at the municipal level. This year a different project came begging to be covered. I received an email in the early summer asking if I had heard of a specific town's wetland regulation restricting activities in the vegetated buffer of watercourses. In my opinion it was an "extreme" or "over-the-top" regulation. I sent off inquiries to an attorney who might have assisted the commission in crafting the regulation and to another who, from the state's perspective at the Attorney General's Office, might be aware of it. No and no. Between ten and fifteen years ago, while I was working at the Attorney General's Office, the Department of Environmental Protection put in writing that, due to staff constraints, it was no longer going to review proposed amendments of municipal wetlands regulations. In the second decade of the 21st century I began to wonder what the mosaic of municipal wetlands regulations looked like without an artist controlling the colors and size of pieces. Were there other towns regulating vegetated buffers? What about vernal pools? And, is it true that 100 feet is the most common size of an upland review area?

What started as a vague inquiry developed into a methodical project to survey the definition of "regulated activity" in all municipal wetlands regulations. I began by gathering the verbatim wording of municipal regulations by accessing them from municipal websites. In September 2013 approximately ¾ of all wetlands regulations could be viewed online. With the need to contact 40+ towns by telephone to request definitions of "regulated activity" I expanded the project to work with a Wesleyan University student intern, Vanessa Castello, who assisted in the collection and crunching of data. She is solely responsible for the splendid color charts in a power point presentation available on the CACIWC website. (In this article I will refer to those charts by page number.)

The survey includes the review of the "regulated activity" definition of 95% of all municipal wetlands regulations. We found municipal staff helpful in faxing and/or emailing requested regulations. In 5% of towns contacted, staff even added a link to the regulations on the official website or made them easier to access![i]

We'll begin by looking at some numbers.

Upland Review Areas

The overwhelming majority (80%) of towns (135) have established a one-size-fits-all upland review area (URA). That is, the size of the URA is the same for a wetland or a

watercourse. In contrast, 22 towns (13%) have established a two-tier URA, one for wetlands and another for watercourses. Two towns have set no URA. They share this status with the DEEP, which has also not established upland review areas for state agency activities. *See* slide 2 of the power point entitled "Overview of Types of Upland Review Areas (URAs).

One-size upland review areas

Of the 135 towns with a one-size-fits-all URA the most common size for that area is 100 feet: 105 towns have a 100 upland review area. *See* green-coded data points on slide 3 of the power point. This is an instance where a picture speaks 1,000 words. The green column at the 100 feet data point towers over the minority of towns that are either under or over 100 feet (approximately twice as many "green" towns below 100 feet [19] as above [11]). These one-size-fits-all upland review areas range from 50 feet to 200 feet.

Variable size upland review areas

Of the 22 towns with one size for wetlands and another for watercourses, 100 feet again is the predominant size, whether it is the size for one town's wetlands or another town's watercourses. *See* purple-coded points on slide 3 of the power point. These upland review areas range from 25 feet to 250 feet.

Variable size upland review areas for named resources

A small number of towns set a specific upland review area greater than the generally applicable URA for named streams, ponds, rivers, etc. Because these URAs are protecting special resources they are larger than the previously-mentioned categories, ranging from 100 feet to 500 feet, with most at 200 feet. *See* red-coded points on slide 3 of the power point.

Vernal pools

All towns are authorized to regulate vernal pools, because the state wetlands statute defines watercourses to include "vernal" watercourses. I was curious to see if towns were incorporating technical definitions of "vernal pool." I excluded those definitions which merely indicated that "vernal" means "occurring in the spring." I looked for a definition with four components: (1) existence of a basin (2) that is wet two months / or dries out (3) that lacks fish and (4) reference to obligate species, whether enumerated or not. Approximately ¼ of all towns (38) have adopted a technical definition of a vernal pool. Eleven (11) towns have adopted an upland review area specific to vernal pools. Those areas range from 100 feet to 500 feet.

Once we get past the numbers, some interesting differences in wording emerge. The East Windsor upland review area, although the smallest within the range, 100 feet, is not an upland review area, it is a non-disturbance area. Monroe's upland review area for vernal pools, the largest in the state (shared also by Killingworth, Redding and Woodbury) at 500 feet is applied if the land exhibits "some characteristics" of a vernal pool. Will landowners know if they fall into the vernal pool category?

Towns without a technical definition in their regulations will need an expert if they wish to dispute the expert opinion of an applicant that a watercourse is or isn't a vernal pool. That said, even if towns have adopted technical definitions in their regulations, an expert is going to be critical in the town's review of vernal pool assessments. Another area that would be useful to examine is how many towns have adopted fee regulations that allow the commissions to assess the costs of a town's expert to the applicant. There are many issues that can be "harvested" from a detailed review of the municipal wetlands regulations.

East Haddam's vernal pool regulations establish that "all potential vernal pools" which cannot be evaluated to determine their status "are to be considered to be vernal pools for regulatory purposes, until such time as a proper determination can be made." I understand the commission's intent, but I struggle to find the statutory authority that allows a commission to make a determination before having an evidentiary basis to make it.

Vegetated buffers or riparian corridors

The thinking behind this topic is that protection of the vegetation in areas adjacent to wetlands and/or watercourses yields protections to the wetlands/watercourses. Most often this area is already within an established upland review area. This was a semi-hot topic for legislative amendment in at least three previous sessions of the General Assembly in the past five years. I say semi-hot, because the bills were not successful. At the time I was part of a loose consortium of individuals and interest groups developing language to be proposed to amend the wetlands statute. I was not aware that any of us knew that a handful of towns were already regulating vegetated buffers. This issue was the most interesting topic I examined for the diverse approaches employed by the towns.

Three towns have established definitions of riparian corridor, buffer or non-disturbance area without specific regulation of such area. Those towns include Canterbury, New Milford and Weston. The size of the corridor, buffer or non-disturbance area would reflect the evidence put forth by the applicant, the public or the commission through its experts.

Five towns have adopted regulatory programs which prohibit activities in a buffer zone with the possibility of agency flexibility: Bloomfield, Killingly, Old Lyme, Pomfret and Windsor. I use the word "buffer" because these commissions intend a no-activity zone, at least as to certain specified activities. The towns vary widely how they accomplish this. One town regulates the area from watercourses: Old Lyme. One town imposes the same width for vegetated buffers from wetland and watercourses: Windsor. Three towns vary the buffer width for wetlands, watercourses, "pocket wetlands," intermittent vs. perennial streams and specifically named resources: Bloomfield, Killingly and Pomfret. Exactly what is prohibited varies by town. There are various procedures provided to present exceptions or vary the requirements. Some are based on site conditions or minor disturbances (Bloomfield). Others reduce/eliminate the requirements if there is no significant impact (Killingly, Pomfret). One town allows activity in

the buffer in exchange for "mitigation," such as allowing previously disturbed buffer area to revert to natural conditions or removing a building or structure in the buffer (Old Lyme).

This is an issue which would benefit from DEEP review. The wetlands act envisions a supervisory role being played by the DEEP. Some of the towns which regulate vegetated buffers articulate that they are doing so to protect wetlands watercourses. So far, so good. Others express an interest in protecting the buffer itself, i.e., adding another resource to their scope of review. That most likely wouldn't withstand legal scrutiny. The question to keep in mind: as a creature of statute, can the wetlands agency find authorization in the statute to support its action? A number of these towns use wording that would put back into their jurisdiction agricultural and other exempt activities which the legislature has removed from them. It may be that these vegetated buffer regulations are not being implemented contrary to the state wetlands law – but they have used wording which would allow new or less experienced commission members to wander outside of the agency's jurisdiction.

Another reason for DEEP to review the regulations periodically and analyze what agencies have done is to uncover success stories. While gathering all of the definitions of "regulated activity," I decided to examine how many commissions have adopted language from the DEP 1997 Upland Review Area Guidance Document: **"The Agency may rule that any other activity located within such upland review area or in any other non-wetland or non-watercourse area is likely to impact or affect wetlands or watercourses and is a regulated activity."** Do you recall the advice given to you by the Attorney General's Office at DEP wetlands training to protect your agency's authority to regulate activities that occur outside of wetlands and watercourses and even outside of established upland review areas?

In 2003 the Appellate Court issued its ruling in *Prestige Builders, LLC v. Inland Wetlands Commission*[ii], that a wetlands agency was not authorized to exert jurisdiction over activities unless the agency had adopted a regulation to regulate where the activity occurred. DEP had already recommended, in its 1997 Upland Review Area Guidance Document, that agencies promulgate a regulation to regulate those activities outside of established upland review areas that are likely to impact wetlands or watercourses.

The results from my survey? You listened and you acted! Seventy per cent of towns (118 towns) have adopted language similar to the sentence in the previous paragraph. It remains unknown whether the Supreme Court will affirm or overrule the *Prestige Builders* holding, but for 118 towns it won't matter, since they have adopted protective language. Again the DEEP is without a regulation authorizing it to act outside of an established upland review area. (DEEP has adopted no upland review area, which distinguishes it from 41 of the 43 towns who also have no *Prestige Builders* protection but have adopted upland review areas.)

My conclusion from undertaking this project is that the municipal agencies are deprived of a valuable resource when DEEP does not perform any supervisory role whatsoever in

reviewing the municipal adoption of wetlands regulations. I learned about topics which should be common knowledge and easy to access. Agencies should easily be able to contact other agencies to ask their experience in rolling out a new regulatory program. I gathered notes on other topics as I was methodically reviewing upland review areas, vernal pools and vegetated buffers. I intend to offer a workshop at the next annual meeting to cover those issues. But that seems too far away to be the sole repository of such information until then. I will be rolling the information out in my blog in small chunks.

As I write this, the last few days of 2013 are expiring. You will be reading it shortly in the New Year. My wish for 2014 -- that DEEP return to "exerc[ising] general supervision of the administration and enforcement" of the wetlands act, as intended by the General Assembly in General Statutes § 22a-39(a), and that all municipal regulations be provided online and easily accessible, for the benefit of agencies, applicants and the public.

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[i] Despite three phone calls to each municipality without online wetlands regulations, eight remained unresponsive. In alphabetical order they include: Bozrah, Canaan, Colebrook, Hartland, Marlborough, Norfolk, Stratford and Wolcott. Members of those commissions are invited to contact me with a copy of the definition of "regulated activity" and also the following, if they exist: "vernal pool," "upland review area" or "vegetated buffer." The survey will be periodically updated.

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