

Journey to the Legal Horizon

*Three Levels Corporation v. Conservation Commission,
148 Conn. App. 91 (2014)
The wetlands law trifecta:
agency denial & expert evidence,
incomplete application and authority to regulate*

Attorney Janet P. Brooks

If you're a new wetlands agency member, this is a great case to give you an overview of the most troublesome legal issues facing wetlands agencies and applicants. For "old-timers" you can sharpen your ken and add some fact patterns that will work (incompleteness, authority to regulate) and won't work (denial not based on substantial evidence). Because this is a case from the Appellate Courtⁱ its legal holdings are bindings on all agencies. Thus, the case is worthy of careful examination.

In February the state Appellate Court issued a decision which includes the trifecta of wetlands law wrapped into one case: (1) permit denial based on expert opinion and another example of what is *not* substantial evidence, (2) the authority of an agency to deny an application based on incompleteness, and (3) the authority of an agency to regulate storm water discharges without regulations that incorporate specific standards for compliance. For lawyers or folks who like to remember concepts by case names, I would call this: (1) *River Bend*ⁱⁱ lives on, (2) *Unistar*ⁱⁱⁱ lives on, (3) *Prestige Builders*^{iv} isn't what you think it is. For those who want the play-by-play analysis: (1) agency loses again unable to prove "actual adverse impact", (2) agency wins again when applicant fails to supplement application as reasonably requested, and (3) agency not required to adopt specific regulations for a specific activity before regulating that activity. For those who just want the score at the end of the game: agency wins this round, 2:1.

What the wetlands agency did

The Redding wetlands agency considered an application for a ten-unit housing development on 14 acres with 1.75 acres of wetlands on property and adjacent to floodplain wetlands and a river. The agency denied the application for four reasons. The agency found that there would be (1) insufficient pretreatment facilities for storm water prior to infiltration and discharge into the wetlands and the river which is likely to have a significant adverse environmental impact on the wetlands and river, (2) insufficient renovation of storm water and septic effluent which is likely to have a significant adverse environmental impact, and that (3) the applicant's failure to supply requested data (impact of activities on the river, impact of pathogens from septic effluent on the wetlands, the relationship between various flood lines of the river and elevations of the septic systems) leaves the agency unable to determine whether those activities present a significant adverse impact to the wetlands or river and (4) no finding can be made that there are no feasible and prudent alternatives.

On appeal

The Superior Court (trial court) sided entirely with the applicant, sustaining the appeal and remanding (sending back) the matter to the agency for impositions of reasonable conditions. At the Appellate Court, each side won and lost on some of the arguments. They break down into three arguments.

Expert evidence

This issue is not going away. There is no retreat from the 2004 decision of the Connecticut Supreme Court in *River Bend*.^v Expert opinion constituting substantial evidence continues to elude some wetlands agencies. This case is another variation on the theme that an agency's denial must be based on expert opinion that identifies a specific adverse environmental impact that would result. When there are multiple experts testifying before an agency, this case affirms that the agency determines which expert is more credible. That said, the agency must look for statements of specific or actual adverse impact. Here's what the Appellate Court said was not substantial evidence, from the expert's statements: "It certainly, in my opinion, is not sufficient to avoid having *some type* of adverse impact on the wetlands due to sediment and erosion materials getting into the wetland, the pond and the riverine system."^{vi} The town's expert continued and noted that the "likelihood of that adverse impact 'is very strong.'" That left the Appellate Court wondering: the likelihood of *what* is very strong? As to the storm water basins, the town's expert stated that the basins will be hard and expensive to maintain. "If it's not maintained, and this is a hypothetical, then you would have adverse impact on the wetland system both from excessive runoff and from the lack of removal of the impurities . . ."^{vii} The Appellate Court reviewed the evidence and found no evidence in the record supporting any likelihood of the failure of the basins. Additionally, the court concluded: "There also was no evidence *specifically indicating what effect, if any, a failure of the detention basin would have on the downslope wetlands.*"^{viii} Please note: the Appellate used those italics in the quote. The purpose is to get your attention. The court referred to the expert's "numerous concerns and critiques," but concluded that the expert "did not identify any specific, actual harm that was likely to occur to the wetlands or Saugatuck River."^{ix}

If you weren't paying attention to the italicized portions of the decision, the Appellate sums it up for you: "The substantial evidence test is not met by a general statement by an expert that 'some type' of adverse impact is likely to result from the proposed regulated activities. . . Absent evidence that identifies and specifies the actual harm resulting therefrom, a commission cannot find that the proposed activities will, or are likely to, adversely impact wetlands or watercourses."^x

Conclusion: reasons #1 and #2 are not supported by substantial evidence. But that doesn't conclude this case.

Incomplete application

The Court upheld the agency's authority to seek additional information from the applicant during the review process. The Court pointed to the municipal regulations which put the applicant on notice of that the agency may request more information. The applicant claimed it was not provided with a description of what information was sought. The Appellate Court spent a good

portion of the decision summarizing the evidence. It noted that the town's expert told the applicant that there was missing information on the impact of household cleaners, solvents, ammonia and medicine that enter a septic system. The town's expert described how the concentration of the various chemicals should be examined for renovation in the soil mantle. He compared the process to the one engaged in by the applicant for pathogens. The agency relied on the town's expert who summarized in a letter: "We do not know what the chemical impact of concentrating so many wastewater systems in a small area will be. On this proposed project, no definitive proof of its impact, or non-impact, has been provided."^{xi} From that comment, the agency concluded that there would be a significant adverse impact on the wetlands and river. The Appellate Court did not agree with the agency's conclusion, but based on the incompleteness of the record, upheld the agency denial. The Court concluded: "The record discloses evidence that the [applicant] failed to present information on the chemical impact of the proposed regulated activities sufficient for the commission to determine whether it would adversely impact the wetlands and Saugatuck River."^{xii} The lack of information does not establish an adverse impact, it provides a reasonable basis to determine that the application is incomplete. Based on earlier cases and the municipal regulations, the agency was authorized to deny an application due to incompleteness.

Conclusion: Reason #3 is a sufficient reason to deny the application.

Need for regulations addressing storm water

The applicant argued that the agency was not authorized to regulate pretreatment facilities for storm water impacts on wetlands and watercourses because it did not have "storm water regulations." The applicant made this argument relying on the *Prestige Builders*^{xiii} case. The court reaffirms that "a commission may not exercise authority over a particular activity unless and until it promulgates a regulation that encompasses the activity."^{xiv} The Court found numerous references in the municipal wetlands regulations that refer to "any activity" which causes a variety of impact. The Appellate Court found no basis to conclude that specific regulations setting compliance standards were mandated. Moreover, the Court noted that the municipal regulations were based on the state DEEP model regulations, which do not set out standards for categories of activities. The municipal regulations allow the agency to regulate the activities to the extent they impact wetlands or watercourses. The regulations identify that storm water is likely to have a significant impact on those resources. The case law establishes that "applicable standards are established through expert testimony before a commission."^{xv}

Conclusion: the agency is empowered through its regulations and the case law to regulate the effects of storm water without adopting specific standards for the activity.

Proving an actual adverse impact continues to be the major reason that agency denials are overturned. It is not sufficient to have an expert that agency members rely on. The expert's statements have to "connect the dots." There has to be an expert link between the reasonable likelihood of the existence of a condition and the conclusion that it is adverse. Here, there was not substantive evidence for either of those. The agency's denial was upheld by the Appellate Court, but not for its decision on the merits – that the activities will cause adverse impacts on the resources, but because the application is incomplete. Finally, agencies can regulate storm water

or other activities, based on broad regulations and develop the specific conditions through use of experts during the meeting/hearing process and the imposition of conditions in a permit.

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.

ⁱ The three-tier court system from lowest to highest levels: Superior Court, Appellate Court, Supreme Court

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

ⁱⁱⁱ *Unistar Properties, LLC v. Conservation & Inland Wetlands Commission*, 293 Conn. 93 (2005)

^{iv} *Prestige Builders, LLC v. Inland Wetlands Commission*, 79 Conn. App. 710 (2003), cert. denied, 269 Conn. 909 (2004)

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

^{vi} (Emphasis in original.) *Three Levels Corporation v. Conservation Commission*, 148 Conn. App. 91, 103-04 (2014)

^{vii} *Three Levels Corporation v. Conservation Commission*, 148 Conn. App. 91, 104 (2014)

^{viii} *Three Levels Corporation v. Conservation Commission*, 148 Conn. App. 91, 111 (2014)

^{ix} *Three Levels Corporation v. Conservation Commission*, 148 Conn. App. 91, 111-12 (2014)

^x *Three Levels Corporation v. Conservation Commission*, 148 Conn. App. 91, 112 (2014)

^{xi} *Three Levels Corporation v. Conservation Commission*, 148 Conn. App. 91, 124 (2014)

^{xii} *Three Levels Corporation v. Conservation Commission*, 148 Conn. App. 91, 128 (2014)

^{xiii} *Prestige Builders, LLC v. Inland Wetlands Commission*, 79 Conn. App. 710 (2003), cert. denied, 269 Conn. 909 (2004)

^{xiv} *Three Levels Corporation v. Conservation Commission*, 148 Conn. App. 91, 135 (2014)

^{xv} *Three Levels Corporation v. Conservation Commission*, 148 Conn. App. 91, 136 (2014)