Journey to the Legal Horizon

Wetlands agencies:
What's in your appendices to your regulations?
Hopefully nothing of substance

In the past month I've happened upon appendices to the municipal wetlands regulations in two different towns. In each case it was unclear what the content in those appendices was supposed to mean. Was the substance contained in the appendix meant to be binding just as the regulations that preceded it? If so, what were they doing in the appendices, instead of in the regulations? I got to wondering how common a practice it is for wetlands agencies to incorporate material into appendices and what material is being appended. I undertook a decidedly modest and perhaps statistically insignificant survey of 10 % of all municipal wetlands regulations (17 sets).[i] I looked at regulations from large and small towns throughout the state, those with and without staff.

To begin, what is an appendix? According to Black's Law Dictionary, 8th Edition, it is "a supplementary document attached to the end of a writing." In this case, to the end of the municipal wetlands regulations. The regulations themselves "have the full force and effect"[ii] of statutes. One half of the towns had no materials in an appendix. About a third of the towns in my survey provided material in an appendix that I categorize as "helpful" or "illustrative." The application form, instructions on filling out the form, diagrams of the placement and control of sedimentation and erosion control barriers, and an application checklist are examples I found. Another category of material is the verbatim inclusion of other laws. In less than a third of the towns I surveyed, I found examples, such as the underlying ordinance that created the wetlands agency, the statutory definition of "farming" from General Statutes § 1-1(q), statutory provisions for processing land use applications in General Statutes § 8-7d and the citation process (for

issuing fines) adopted by town ordinance. That can be helpful – as long as the referenced law is up-to-date.

That was a problem with the three towns that included General Statutes § 8-7d. They referenced a version of § 8-7d that was no longer in effect. What was missing was the amended version addressing how additional public notice may be undertaken and the specifics of that notice. That's a significant amendment. If an agency wants to provide the wording of a statute, perhaps it should be prefaced with a statement, such as: "For informational purposes only. For the current language in effect, consult the most recent version of the Connecticut General Statutes at https://www.cga.ct.gov/. " (That is the website for the Connecticut General Assembly which maintains a digital version of the state statutes for public access.) For municipal ordinances, the instruction could be to consult the most recent version in the town clerk's office.

I was stumped to find the entire1997 DEP Guidelines Upland Review Area Regulations Connecticut's Inland Wetlands & Watercourses Act in one set of appendices. Those guidelines were designed to support wetlands agencies with technical information as agencies consider adopting upland review areas. The guidance document offers a variety of approaches for establishing the areas. It's not particularly useful to an applicant, the public or members of an agency, once an upland review area is adopted by regulation. At that point, only the adopted regulation is of concern. In another town, one sentence was excerpted from the guidelines and included in an appendix. However, that town already had established an upland review area which was reflected in its regulations, which was not the same as the method included in the appendix. What was intended by putting a different method in an appendix?

The fourth edition to the DEEP Inland Wetlands and Watercourses Model Municipal Regulations includes three appendices: General Statutes § 1-1(q) (the definition of farming) in Appendix A, General Statutes § 8-7d (the procedural requirements and deadlines for processing land use applications) in Appendix B and the DEP upland review area guidelines in Appendix C. However, DEEP included those to explain what or why it was proposing revisions to the third version of the model regulations.[iii] While I didn't see anything in the Model Regulations that encouraged agencies to include the appendices in their municipal regulations, perhaps DEEP was advocating just that through its wetlands training program. A conversation with Darcy Winther, the DEEP municipal liaison set me straight. DEEP had not done so. Perhaps some agencies just included Appendix A, Appendix B and Appendix C of the Model Regulations to their regulations thinking it was expected of them. It has been more than a decade since DEEP has reviewed proposed amendments to municipal wetlands regulations. DEEP oversight as agencies are amending their regulations – *as the legislature envision and mandated*[iv] – would be invaluable.

Before leaving this topic, I did find one novel issue in an appendix: fining guidelines. I hope that those guidelines reflect an already adopted ordinance which established a citation process reflecting those "fining guidelines." Simply adopting "fining guidelines" and putting them in an appendix or in municipal regulations isn't enough. There needs to be authority in the wetlands statute. To date, the legislature has set out three methods to have someone violating the wetlands law financially penalized: the agency can bring an enforcement action in court to stop the violation and, among other things, to have the court impose a civil penalty;[v] a town may adopt an ordinance establishing fines and a citation process;[vi] as part of a criminal action handled by the state's attorney's office, a court may impose criminal fines.[vii]

Each commission would serve its community well by examining the wetlands regulations and noting if there is information contained in appendices. If there is an appendix and the information is "helpful," no further action may be needed. On the other hand, if there is some substantive material that the commission wants to rely on, show it the sunlight of the regulation process: adopt it as a regulation after conducting a public hearing. And for those other issues that leave the commission members wondering why something ever was put in an appendix – or upon reflection sets up a process not supported by the wetlands law, well, an appendectomy may be warranted.

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[i] In a recent discussion with Darcy Winther, DEEP municipal wetlands liaison, I learned that there are 171 "municipalities" for purposes of wetlands regulations, the usual 169 + Fenwick (in Old Saybrook) and the borough of Groton, geographically located within the town of Groton.

[ii] *Sarrazin v. Coastal, Inc.*, 311 Conn. 581, 603 (2014).

[iii] Discussion with Darcy Winther, DEEP municipal wetlands liaison.

[iv] "A copy of the notice and the proposed regulations or amendments thereto . . . shall be provided to the commissioner at least thirty-five days before such hearing." General Statutes § 22a-42a(b).

[v] General Statutes § 22a-44(b).

[vi] General Statutes § 22a-42g.

[vii] General Statutes § 22a-44(c).