Journey to the legal horizon

by

Attorney Janet P. Brooks

Consideration of wildlife by wetlands agencies:
5 years later

In the October, 2003 the Connecticut Supreme Court issued its decision in AvalonBay Communities, Inc. v. Inland Wetlands Commission, 266 Conn. 150 (2003), in which it concluded that the inland wetlands and watercourses act "protects the physical characteristics of wetlands and watercourses and not the wildlife, including wetlands obligate species, or biodiversity."[i] In a footnote the Court provided for consideration of wildlife in exceptional cases: "There may be an extreme case where a loss of or negative impact on a wildlife species might have a negative consequential effect on the physical characteristics of a wetland or watercourse . . ."[ii] Hot off the press, this decision was subject of a workshop at the November 2003 CACIWC annual meeting. The reactions of wetlands agency members in attendance ranged from shock to frustration to anger – until that decision wildlife was a common topic included in report from applicants submitted to agencies around the state.

The legislature responded promptly in the 2004 legislative session to the discontent in the environmental and regulatory community with a bill reflecting a compromise between the Connecticut Homebuilders Association and a consortium of environmental organizations, including CACIWC. I've heard some folks debate that the new law codifies (affirms) the Supreme Court's decision while others say, the law restores wildlife to an agency's jurisdiction. Who's right? Well, they both are. Five years after the passage of the law it's time to reflect on those legislative changes. Have you incorporated those changes into your standard operating procedure?

To begin, the legislature added two provisions to General Statutes § 22a-41. Section 22a-41 gives direction to the DEP and agencies on how to carry out their duties under the wetlands law including "regulating, licensing and enforcing" the wetlands act. In other words, it applies to all of the duties. The legislature established that: "(1) 'wetlands or watercourses' includes aquatic, plant or animal life and habitats in wetlands or watercourses, and (2) 'habitats' means areas or environments in which an organism or biological population normally lives or occurs." General Statutes § 22a-41 (c). This subsection clearly reverses the holding in first AvalonBay quotation above. The legislature restored the jurisdiction of the DEP and wetlands commissions to consider wildlife and habitats, in carrying out their duties.

However, the legislature placed significant restrictions *on wetlands agencies but not DEP*, when reviewing applications for regulated activities occurring outside of wetlands and watercourses. "A municipal inland wetlands agency **shall not deny or condition an application** for a regulated activity in an area outside wetlands or watercourses **on the basis of an impact or effect on aquatic, plant, or animal life unless such activity will likely impact or affect the physical characteristics of such wetlands or watercourses**." General Statutes § 22a-41 (d). This subsection codifies the Supreme Court's decision for activities occurring in the upland review area or outside the upland review area.

To implement this provision of the law:

- Check where the regulated activity will occur.
- If it is in a wetland or watercourse, you may consider the impact on wildlife and deny or place conditions on the application solely based on the adverse impact to "aquatic, plant or animal life."
- If the regulated activity is in the upland review area or beyond, and the proposed activities will likely impact or affect the physical characteristics of wetlands or watercourses, you may deny or place conditions on the application based on the impact on "aquatic, plant or animal life."
- If the regulated activity is in the upland review area or beyond, and the proposed activities will NOT likely impact or affect the physical characteristics of wetlands or watercourses, you may NOT deny or place conditions on the application based on the impact on "aquatic, plant or animal life."

Do your agency regulations include these changes in law? I was appearing before a wetlands agency this spring that was inquiring about impact on vernal pools when no activity was proposed for the vernal pool. In looking at the agency regulations, I discovered that they had not been amended since 2001. This change in law is not intuitive – you will need to amend your regulations in order to have the correct wording before you. The 2006 DEP Model Regulations include these changes at § 10.5 [General Statutes § 22a-41 (c)] and § 10.6 [General Statutes § 22a-41 (d)].

The debate now focuses on what a physical characteristic is. Surely, sediment that finds its way into a wetland affects the physical characteristic of that wetland. Activity in the upland review area that changes the temperature of the watercourse, such as removal of a vegetated canopy which allows the sun to heat up the watercourse is a physical characteristic. (Reminder: do you have expert evidence to "connect the dots" between the removal of the canopy and the change in water temperature?).

Your authority to consider the impacts on wildlife from a regulated activity has not changed when the proposed regulated activity occurs in the wetlands or watercourse. Outside of wetlands or watercourses, you have had to consider a series of questions, before you could deny an application based on impact to wildlife or even impose a condition in a permit. If you are reading this article, reflecting on your agency's standard operating procedure which already incorporates all of these changes, and wondering why other agencies are having trouble, congratulations! For any other agencies, check to make sure your regulations are current, and develop a checklist of when you can consider impacts to wildlife.

Attorney Janet P. Brooks practices law in Middletown at D'Aquila & Brooks, LLC.

[i] AvalonBay Communities, Inc. v. Inland Wetlands Commission, 266 Conn. 150, 163 (2003).
[ii] AvalonBay Communities, Inc. v. Inland Wetlands Commission, 266 Conn. 150, 163 n.19 (2003).