# "Journey to the legal horizon"
# Environmental Intervenors

Question:

An environmental intervenor has submitted a petition requesting notice of any meeting on a specific application. The intervenor believes that contact with staff on the application, whether by telephone, e-mail or an in-person meeting is subject to notice. Is an environmental intervenor legally entitled to notice of any "meeting" that the wetlands agency staff has with the applicant or its representatives?

Answer:

This question presents the first opportunity in this column to look at the effect that the Connecticut Environmental Protection Act[1] ("CEPA") has upon the Inland Wetlands and Watercourses Act. We'll start with a general overview of CEPA and end with the opening question.

Wetlands agencies have to carry out their duties under the Inland Wetlands and Watercourses Act. Wetlands agencies are "creatures of statute" and can not act outside their enabling statute. However, other laws apply to wetlands agencies as well, most notably, the Freedom of Information Act ("FOIA"), which establishes the right to open meetings and access to public documents. CEPA is another law that can apply to wetlands agencies. It is an unusual law, in that *CEPA applies only when it is invoked.* In contrast, FOIA applies to wetlands agencies without having to be invoked. CEPA was passed in 1971 to provide "all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction." The law creates two remedies: (1) bringing a court action to stop the unreasonable conduct (no money damages); (2) intervention by anyone, broadly defined, in administrative agency proceedings to raise environmental issues.

Any person, and more specifically "the Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof" can become an intervenor by filing a "verified pleading." The Connecticut Supreme Court has interpreted the list of potential intervenors quite broadly. The intervention of a town council was upheld in zoning and wetlands agency proceedings. 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. Through court cases, the law has been interpreted to protect only those natural resources over which the agency has jurisdiction. So, while inland wetlands

[1] The Connecticut Environmental *Protection* Act should not be confused with the Connecticut Environmental *Policy* Act, also referred to as CEPA, a law which requires *state agencies* to make a written evaluation of environmental impacts before proceeding with actions which may potentially adversely affect the environment.

and watercourses may be the subject of a CEPA intervention before a wetlands agency, air quality may not.

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. 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.

CEPA intervention provides a potent tool to present an agency with testimony and argument why an application should be denied. A third party does not have to rely on the strength of an agency and its ability to evaluate an applicant's proposal. The CEPA intervenor can provide it through its experts. The intervenor is on equal footing with the applicant. The applicant needs to show its entitlement to a permit; the CEPA intervenor proof of the unreasonable pollution, impairment or destruction of a natural resource.

The CEPA intervenor has more rights than a member of the public speaking at a public hearing. The intervenor may rebut evidence and cross-examine witnesses. The right of the public to participate is not expanded by the presence of a CEPA intervenor in a proceeding.

But does the authority to intervene in an administrative proceeding extend to involvement in the staff's day-to-day administering of the wetlands program in the town hall? Probably not. There haven't been any legal cases addressing this question, but it is hard to identify the legal theory to support intervention into the town employee's administering of his/her duties. Agency proceedings take place in public places upon duly noticed meetings. The actions of an agency at such a meeting constitute the agency proceedings, not the staff's discussions on the telephone or in person at the counter in the land use office, reply to an e-mail. After all, case law has clearly stated that an agency does not have to endorse an opinion held by the staff. The staff has no voting power.

The amount of time town staff can devote to an applicant, member of the public or CEPA intervenor will vary from town to town. CEPA does not prescribe a course of conduct between town staff and intervenors. A town is free to allocate its staff resources as it chooses in administering the wetlands act. In some towns staff may give the intervenor notice of communication between the staff and the applicant. CEPA does not require town staff to give notice of such communications. The law establishes a mechanism to permit third-party intervention into an agency proceeding and to require the agency to determine whether the proposed activity is reasonably likely to unreasonably pollute, impair or destroy a natural resource.

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