

SEGMENT 2

Connecticut's Inland Wetlands and Watercourses Act:
A Legal, Administrative, and Resource Management Update

Presentation by
The Attorney General's Office

RECENT COURT CASES

A. Supreme Court Cases

i. *Unistar Properties, LLC v. Conservation & Inland Wetlands Commission of the Town of Putnam, 293 Conn. 93 (2009)*

Background

Unistar co-owned a 62-acre parcel encompassing five wetland areas, including two vernal pools in the center of the property. Unistar submitted an application for a 34-lot subdivision to be constructed outside the wetlands and the upland review area. A roadway and a cul-de-sac would encircle the two vernal pools. Unistar proposed the creation of a wetland into which most of the stormwater from the property would be discharged, following treatment.

The commission forwarded for review the application to the Eastern Connecticut Conservation District, Inc., which suggested increasing a buffer area around the vernal pools, and concluded that the redirection of surface water away from the natural wetlands would “seriously compromise[]” their water supply.

The commission conducted a public hearing, at which Unistar presented expert evidence that the proposal would not affect wetlands. CEPA intervenors presented contradictory expert evidence, which concluded that additional information was necessary to quantify the impact. The commission’s own expert concluded that the application lacked information required by the regulations, including a plant and wildlife inventory and an analysis of the impact on plant and wildlife. Unistar submitted a modified plan and additional evidence, but the intervenors maintained that an adverse impact was likely and further information was necessary. The commission denied Unistar’s application as incomplete because it lacked a detailed wildlife inventory and an analysis of alternatives concerning potential wetlands impacts raised during the hearing.

Unistar appealed to the superior court, which dismissed the appeal on the basis that substantial evidence existed to show that the application was incomplete and that this was a proper basis for denial.

On appeal to the Connecticut Supreme Court, Unistar argued that because it had established by expert evidence that its proposal would not change the physical characteristics of the

wetlands, the commission had no authority to request a wildlife inventory or an analysis of alternatives. The court disagreed and held that the commission properly denied Unistar's application as incomplete.

Major Points

1. The substantial evidence test applies to a commission's determination that an application is incomplete.
2. The statement of purpose of the Inland Wetlands and Watercourses Act in 22a-36, the factors for consideration in 22a-41(a)(1) - (4) and (6), and 22a-41(c) all indicate that a commission must consider aquatic, plant, and animal life and habitat, not just wetlands and watercourses as "containers of soil and water." For the purpose of determining whether a proposed regulated activity will impact wetlands and watercourses, a commission may request a wildlife inventory.
 - a. The commission may request an inventory without receiving evidence that an impact to wildlife would change the physical characteristics of the wetlands; the purpose of the inventory is to determine whether the proposal will impact wildlife and whether such impact will change physical characteristics.
 - b. Although the court acknowledged the commission had adopted regulations authorizing a plant and wildlife inventory, this was not dispositive, as the court based its conclusion primarily on the IWWA.
 - c. A request for a wildlife inventory for an area outside wetlands may be arbitrary and capricious, and unlawful, if the distance between the area and the wetlands is so remote and makes it so unlikely that the proposed activity could affect the wetlands.
3. A commission may request alternatives to the proposed regulated activity for the purpose of determining whether the proposed activity will impact wetlands or watercourses.

B. Appellate Court Cases

i. *Town of Canterbury v. Christopher Deojay, 114 Conn. App. 695 (2009)*

Defendant landowners appealed the judgment of the Superior Court after trial which enjoined them from performing any further work on their property and imposed a civil penalty for violation of cease & desist order, costs, and fees. Plaintiffs, a town, its inland wetlands and watercourses commission (IWC), and its enforcement officer, filed a two-count enforcement action. The Appellate Court affirmed the judgment of the trial court.

Overview:

Canterbury's suit sought enforcement of its cease and desist order and an injunction prohibiting defendants from conducting regulated activities in the wetlands or watercourse on their property, requiring them to remove all fill, and requiring them to restore the wetlands and watercourse that had been damaged by their unauthorized regulated activities. Defendants essentially relied upon their contention that their actions in establishing a blueberry farm were agricultural in nature and, therefore, they were exempt from the

regulations. The court found, however, that defendants never obtained a determination from the IWC whether their purported agricultural use of their property was exempt from the regulations; therefore, the trial court properly did not address that issue because such determination must be made by the IWC in the first instance. The court further noted that because the defendants did not appeal an IWC permit decision containing a bond requirement, there was no merit to their challenge on that issue. The court also found that, contrary to defendants' contention, the IWC was not legally required to publish its decision issuing the cease and desist order.

Factual Background:

After permit application to clear lot and correct drainage problem was denied 10/05, defendants removed trees in wetlands. IWC issued order 1/06 to cease & desist further activity until new application submitted and approved. Additional trees removed 5/06. IWC filed suit in court 7/06 seeking enforcement of the order and an injunction prohibiting the defendants from conducting regulated activities without a permit.

Defendants filed 2nd permit application 8/06 requesting construction of agricultural pond, planting of blueberries, shed & driveway in upland review area, construction of house & septic system. Defendant said during cease & desist period, he had dug the agricultural pond. IWC approved 2nd permit application 9/06 and lifted order with condition that defendant post bond of \$8,000 to ensure that the proposed farming activity would actually take place. Defendant did not appeal; did not post bond. 7/07 and 8/07 trial in Superior Court. Court decision 1/08 imposed civil penalty of \$10,000 with costs, expert witness fees and attorney's fees.

Major Points:

1. Person proposing activities claimed to be exempt under the agricultural exemption must first, before undertaking any activity, notify the IWC of intentions and obtain a determination from IWC of whether each of the activities falls within the exemption.
2. IWC must be provided with sufficient information to enable it to properly determine that each proposed activity does not require a permit.
3. Though Court says newspaper publication of cease & desist order decision is not legally required, DEP recommendation is that notice of all such decisions be published.
4. While IWC may lawfully impose bond as condition for permit application, no conditions may be attached where the activity at issue has been determined to be exempt.

ii. *Red 11, LLC v. Conservation Commission of the Town of Fairfield*, 117 Conn. App. 630, cert. denied 294 Conn. 918 (2009).

Red 11, LLC d/b/a Twin Oaks Farm appealed to the Superior Court from the issuance of three cease & desist orders by the Conservation Commission of Fairfield. The Conservation Commission (IWC) ordered the plaintiff property owner to cease and desist activities on the property that were impacting wetlands and watercourses. The owner appealed to the Superior Court which dismissed the appeal. The owner sought further review from the Appellate

Court which affirmed the decision of the trial court. The owner petitioned the Supreme Court to hear the case, but that petition was denied.

Overview:

A wetlands compliance officer issued a cease & desist order to the owner of an 18-acre property with three areas of wetlands, alleging it had filled, drained, and excavated regulated wetlands and watercourses without a permit. The IWC affirmed the order, finding that the violations had a significant adverse impact on wetlands and watercourses on and off the owner's property. The trial court rejected the owner's claim that its activities fell within the farming exception set forth in Conn. Gen. Stat. § 22a-40 and a town regulation. The Appellate Court held that the commission's prior ruling, declaring the owner's proposed farming activities exempt from regulation, did not deprive it of jurisdiction to find that the owner's subsequent actions were improper. The trial court properly held that § 22a-40(a)'s phrase, "with continual flow," did not apply to both wetlands and watercourses, as the owner claimed, but only to watercourses. Because substantial evidence established that the wetlands had been filled in, and because the owner failed to meet its burden to show that its replacement of a vernal pool with a farm pond was essential to farming operations, the IWC properly affirmed the cease & desist orders.

Factual Background:

A cease & desist order was issued 9/01 to stop activities from impacting wetlands and watercourses. Owner states he intended to create a farm. IWC asked him to submit his plan. Upon review of plan, IWC issued declaratory ruling 10/01 that the proposed activities were allowed as of right and did not require a permit. The ruling also stated that the vernal pool could not be filled in. Cease & desist order was lifted. In 7/03 second cease & desist order was issued alleging owner had engaged in filling, piping, draining and excavating regulated wetlands and watercourses without a permit. Owner denied access to property; observations taken from adjacent property and by helicopter surveillance. Owner claimed activities were exempt as farming activities. Neighboring owners intervened. IWC affirmed order and owner appealed claiming violation of due process in not being permitted to present evidence in rebuttal to that presented by intervenors. Court agreed and remanded to IWC to allow owner opportunity to present rebuttal evidence.

IWC opened rebuttal hearing 3/04, modified its findings on stone wall and continued 2nd cease & desist order in effect. Evidence was presented that a vernal pool had been excavated to create a farm pond, changing its biological function. Owner appealed. Third cease & desist order issued 6/04 for continuing activities beyond 3/04 cease & desist order including additional filling and grading of wetlands, excavation of a drainage ditch and earth moving of large wetlands soil stockpile. IWC affirmed and owner appealed 3rd cease & desist order. Superior Court affirmed the decisions of the IWC for all three orders. Appellate Court agreed saying violations alleged in 7/03 had not been considered or decided by IWC in 10/01 proceeding.

Major Points:

1. Legislature has established limitations to the farming exemption. Exceptions to statutes are to be strictly construed and those who claim the benefit of such exceptions have the burden of proving that they come within the limited class for whose benefit it was established.

2. Farm pond only comes within exemption if IWC makes determination it is essential to farming activity. Owner bears the burden of establishing that the farm pond is essential to the farming operation. Expert evidence that irrigation is critical to farming operations does not establish that a farm pond is essential to the operation, merely that irrigation is needed. Need evidence that water from another source could not be used.
3. IWC ruling that a plan for proposed agricultural use does not require a permit does not mean that the IWC has no jurisdiction over additional or future activities taking place on the property that affect wetlands.
4. Agricultural exemption does not allow the “filling or reclamation of wetlands or watercourses with continual flow” as an exempt activity. The phrase “with continual flow” applies only to watercourses and not to wetlands.

iii. *Conservation Commission of the Town of Fairfield v. Red 11, LLC*, 119 Conn. App. 377 (2010)

Overview:

The Appellate Court held that it had previously rejected the owner's claim that the IWC lacked jurisdiction over the property. (See case above.) The record was inadequate for the court to review the owner's claim that the IWC was estopped from seeking restoration of the property by reason of its 10/01 declaratory ruling. The court's issuance of the permanent injunction was proper under Conn. Gen. Stat. § 22a-44(b). The trial court found that the owner's activities, including excavation and removal of wetlands soils, natural stones, and boulders, coupled with the installation of a piping system, destroyed the function of the wetlands. The conduct was egregious and resulted in significant injury to the wetlands and the owner's refused to comply with multiple cease & desist orders. The equities were weighed in ordering the injunctive relief to restore the property. The proposals for restoration were considered, and the commission's plan was credited.

Factual Background:

Upon the 8/04 complaint of the Conservation Commission of Fairfield (IWC), the Superior Court issued a permanent injunction, civil penalties of \$25,000 and attorneys' fees against Red 11, LLC d/b/a Twin Oaks Farm prohibiting it from undertaking any further construction activities and requiring restoration. Neighboring property owner intervened as a plaintiff. Superior Court rejected owner's restoration plan calling for creation of cranberry bog and piping system and ordered legitimate restoration plan. Red 11, LLC appealed the court's decision challenging the injunction and raising a claim of municipal estoppel. The Appellate Court affirmed the judgment of the Superior Court.

Major Points:

1. Where statute authorizes town to seek an injunction, town is not required to prove irreparable harm. All that must be shown is a violation of the regulation.
2. Where restoration is possible, the purpose of restoration is to put the property back into the condition it was before the violations.

Conn. Gen. Stat. Sec. 22a-41. (Relevant section)

...

(c) For purposes of this section, (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.

(d) 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.

Conn. Gen. Stat. Sec. 22a-40. (Relevant section)

(a) The following operations and uses shall be permitted in wetlands and watercourses, as of right:

(1) Grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less essential to the farming operation, and activities conducted by, or under the authority of, the Department of Environmental Protection for the purposes of wetland or watercourse restoration or enhancement or mosquito control. The provisions of this subdivision shall not be construed to include road construction or the erection of buildings not directly related to the farming operation, relocation of watercourses with continual flow, filling or reclamation of wetlands or watercourses with continual flow, clear cutting of timber except for the expansion of agricultural crop land, the mining of top soil, peat, sand, gravel or similar material from wetlands or watercourses for the purposes of sale; . . .

(b) The following operations and uses shall be permitted, as nonregulated uses in wetlands and watercourses, provided they do not disturb the natural and indigenous character of the wetland or watercourse by removal or deposition of material, alteration or obstruction of water flow or pollution of the wetland or watercourse:

(1) Conservation of soil, vegetation, water, fish, shellfish and wildlife; and

(2) Outdoor recreation including play and sporting areas, golf courses, field trials, nature study, hiking, horseback riding, swimming, skin diving, camping, boating, water skiing, trapping, hunting, fishing and shellfishing where otherwise legally permitted and regulated.

Conn. Gen. Stat. Sec. 22a-44. (Relevant section)

(a) If the inland wetlands agency or its duly authorized agent finds that any person is conducting or maintaining any activity, facility or condition which is in violation of sections 22a-36 to 22a-45, inclusive, or of the regulations of the inland wetlands agency, the agency or its duly authorized agent may issue a written order, by certified mail, to such person conducting such activity or maintaining such facility or condition to cease immediately such activity or to correct such facility or condition. Within ten days of the issuance of such order the agency shall hold a hearing to provide the person an opportunity to be heard and show cause why the order should not remain in effect. The agency shall consider the facts presented at the hearing and within ten days of the completion of the hearing notify the person by certified mail that the original order remains in effect, that a revised order is in effect, or that the order has been withdrawn. The original order shall be effective upon issuance and shall remain in effect until the agency affirms, revises or withdraws the order. The issuance of an order pursuant to this section shall not delay or bar an action pursuant to subsection (b) of this section [enforcement action in superior court]. The agency may file a certificate of such order in the office of the town clerk of the town in which the land is located and the town clerk shall record such certificate on the land records of such town. Such certificate shall be released upon compliance with such order. . . .

(b) . . .

(c) . . .

Court Case Chronology

Supreme Court Case

i. *Unistar Properties, LLC v. Conservation & Inland Wetlands Commission of the Town of Putnam, 293 Conn. 93 (2009)*

Unistar submits application for 34-lot subdivision on 62 acres with 5 wetlands, including 2 vernal pools. A roadway and cul-de-sac are proposed to encircle vernal pools.

- No disturbance in wetlands or URA
- Most stormwater will be treated and directed to man-made wetland
- Soil scientist report says protection of wetlands should focus on water quality

Commission sends application to Eastern Connecticut Conservation District, Inc.:

- Vernal pools of high quality, should increase buffer to 200’;
- Direction of runoff from wetlands would seriously compromise their water supply.

1st Public Hearing:

Unistar’s soil scientist:

- 1) Proposal will not significantly alter or negatively impact wetlands;
- 2) IWWA doesn’t require additional protection of wetlands;
- 3) Direction of runoff will not compromise water supply.

Intervenor’s soil scientist:

- 1) Disputes conclusion of no impact;
- 2) Application lacks necessary information: a) inventories and characterizations of vernal pools, their hydrology, surveys of their flora, fauna, and amphibians; b) “water budget” for wetlands; c) analysis whether septic system discharge will impact.

Site Walk Occurs

2nd Public Hearing:

Unistar’s engineer:

- 1) Proposal will reduce water to wetlands (3”/10,000 gal.).

Unistar's soil scientist:

- 1) Proposal will not impact physical characteristics of wetlands.

Intervenor's soil scientist:

- 1) Vernal pools "hydrologically vulnerable" with existing water flow and proposal would reduce flow by one-third;
- 2) No specific topography and wildlife inventory.

Commission asks for:

- 1) Alternatives analysis;
- 2) Wildlife inventory.

3rd Public Hearing:

Unistar modifies proposal to create stormwater basin to discharge filtered water to wetlands so no net loss in volume; inventory unnecessary because no impact to wetlands.

Commission sends application to engineering firm:

- 1) Deficiencies in drainage information;
- 2) Some wetlands would receive different amounts of water;
- 3) Inventory and analysis of impact necessary.

4th Public Hearing:

Unistar submits:

- 1) Wildlife inventory;
- 2) Drainage report (concluding no sedimentation; 1 wetland would receive additional water, but no adverse impact);
- 3) No analysis of alternatives submitted.

Intervenors' soil scientist:

- 1) Inventory inadequate because it lists the species occupying the site, not wetland-by-wetland.

Commission denies:

- 1) Wildlife inventory inadequate;
- 2) No analysis of alternatives.

Appellate Court Cases

i. *Town of Canterbury v. Christopher Deojay, 114 Conn. App. 695 (2009)*

- 11/04 certificate of zoning compliance.
- 7/05 WEO notifies owner of wetlands violation (informal letter).
- 8/05 owner submits permit application.
- 10/05 IWC denies permit application. No appeal.
- 1/06 WEO issues cease & desist order.
- 2/2/06 cease & desist order hearing – agricultural exemption claimed. IWC affirms order. Order is final. No appeal.
- 2/27/06 IWC sends letter to owner re: noncompliance with order.
- 7/06 IWC initiates lawsuit for injunction in superior court.
- 8/06 Owner files 2nd permit application.
- 9/06 2nd permit application granted; requires bond of \$8,000. No appeal of condition requiring bond.
- 7/07 & 8/07 Trial in superior court.
- 1/08 Court issues memorandum of decision after trial. Decision is appealed.

ii. & iii. ***Red 11, LLC v. Conservation Commission of the Town of Fairfield***,
117 Conn. App. 630, cert. denied 294 Conn. 918 (2009)

Conservation Commission of the Town of Fairfield v. Red 11, LLC,
119 Conn. App. 377 (2010)

9/01 cease & desist order issued – agricultural exemption claimed;
owner says intention is to create farm.

10/01 IWC issues declaratory ruling that proposed agricultural
activities as depicted in plan are allowed as of right; no permit
required. Order lifted.

7/03 2nd cease & desist order issued—filling, piping, draining,
excavating. Owner denied access; observations from adjacent
property, helicopter surveillance.

Neighbors intervene in hearing.
Order affirmed. Owner appeals to superior court.
Court orders remand to allow owner to present rebuttal
evidence.
Evidence presented by intervenors.

3/04 rebuttal hearing before IWC; additional evidence. IWC
modifies order re: perimeter stone wall but continues order in
effect.
Owner files 2nd appeal of that decision.

6/04 3rd cease & desist order for violations above & beyond those
from 3/04 hearing. Order affirmed after hearing.
Owner files 3rd appeal.

Superior court affirms the orders in the three appeals. Owner
appeals to Appellate Court.

* * * * *

8/04 IWC initiates action for injunctive relief in superior court.
Neighbor intervenes in enforcement action.