2010 MUNICIPAL INLAND WETLAND COMMISSIONERS TRAINING PROGRAM

Connecticut's Inland Wetlands and Watercourses Act:
A Primer for New Inland Wetlands Agency Members and Staff

Presentation by

The Connecticut Attorney General's Office

A. History

1. Inland Wetlands and Watercourses Act first passed in 1972

2. See "*A Chronology of CT's Wetland and Watercourse Protection*" (Appendix 1)

B. The Three Branches of Government

1. Legislature: establishes the state's policy by passing the law

2. Executive: executes or implements the law, adopts regulations to flesh out the policy contained in the statute - regulations may not change the legislative policy; can use discretion when enforcing the law

   INLAND WETLANDS AGENCIES ARE PART OF THE EXECUTIVE BRANCH

3. Judicial: evaluates whether the executive branch (i.e., inland wetlands agency) has properly implemented the statute; interprets the law; three levels of courts

C. What is the "Law"?

The statute (legislative branch) along with the regulations (executive branch) construed by court decisions (judicial branch)

D. How Does the Law Evolve?

The courts decide appeals of the inland wetlands agencies' actions, applying the Act to the facts and may affirm or reverse the agency's decision. If the legislature disagrees with the Appellate Court or Supreme Court decision, it may amend the statute. (If the court's decision was based on constitutional provisions, amendments to the constitution are the exclusive method for overriding the court's holding.)

(STATUTE + REGULATIONS) as interpreted by the COURTS = THE LAW

E. Laws and Regulations that Apply to Inland Wetlands Agencies

1. Connecticut Inland Wetlands and Watercourses Act (IWWA)
2. U.S. and Connecticut Constitutions
3. Connecticut Freedom of Information Act (open government act; open records; notice of meetings; conduct of public hearings; rights of the public)
4. Connecticut Environmental Protection Act (known as CEPA; citizen intervention statute; properly invoked with supporting affidavit and "colorable claim of un-reasonable pollution, impairment or destruction of the environment")
5. Municipal Inland Wetlands and Watercourses Regulations
6. Municipal charter
7. Municipal ordinance
8. Agency bylaws

F. Jurisdiction of Inland Wetlands Agency

1. Authority over "regulated activities"
    a. Inland wetlands agency determines its jurisdiction
    b. Determine impact to wetlands and watercourses
    c. Permitting and enforcement
2. Statute defines "regulated activity" rather than "regulated area"
3. "Permitted as of right" and "non-regulated" operations and uses
    a. Narrowly construed
4. Authority to regulate in the Upland Review Area
    a. Upland Review Area established for administrative convenience
    b. Supported by case law
    c. See DEP's model regulations
5. Feasible and Prudent Alternatives
    a. Requires a preliminary finding of impact to the wetlands/watercourses

6. Denying permits based on impacts to aquatic/plant/wildlife in wetlands and watercourses

    a. May not deny or condition permits based on impacts to aquatic/plant/wildlife outside wetlands and watercourses without evidence of likely impact or affect to the physical characteristics of such wetlands or watercourses (*see* Conn. Gen. Stat. Section 22a-41(d))

G. Factors for Consideration

1. The IWWA sets out a number of factors, focused on the regulated activity, that inland wetlands agencies shall consider when making decisions related to regulating, licensing and enforcing the IWWA

2. The Inland Wetlands Agency does not need to express an opinion as to each factor, but must address relevant factors with particularity (that is, applying the factor(s) to the facts of the permit application)

3. Enables agency to consider mitigation measures as a condition of issuing a permit with priority being given to restoration of wetlands and watercourses

    a. Statute states order of priority: restore, enhance, create

H. Regular Meeting vs. Public Hearing

1. At a duly noticed meeting, the municipal inland wetlands agency may proceed in a "regular meeting" or a "public hearing" format

    a. Regular Meeting: agency receives input from applicant, relevant municipal agencies/employees, outside experts on behalf of the applicant and/or municipality, and other relevant parties (i.e., CEPA intervenors), but does not receive input from the public

    b. Public Hearing: after proper, detailed public notice, agency receives input from all of the above in addition to comment or questions by members of the public

2. Agency proceedings are informal, strict rules of evidence do not apply; must comply with "rules of fundamental fairness" (term from court decision):

    a. Notice of meeting

    b. Parties have a right to produce relevant evidence, to cross-examine witnesses and to offer rebuttal testimony

    c. Parties have opportunity to know all facts on which the agency is going to rely

    d. Decision by an impartial, unbiased agency

e. No receipt of evidence outside of meeting/hearing process ("ex parte" receipt of evidence is prohibited)

I. Making the Record

1. The "record" is generally the only thing a judge will review when an appeal is brought from an agency decision

    a. The record consists of: the application; all maps and documentation related to the application; all evidence received by the agency at the meeting/hearing; all correspondence, reports, notes and emails related to the application; the notice of the meeting; the decision of the agency on the application; the minutes of the meetings/hearings and site walk(s); and the transcripts of the meetings/hearings, if any

2. The Attorney General's Office strongly urges that all meetings be taped, not just public hearings

3. The agency "makes" the record by:

    a. Questioning the applicant and its witnesses thoroughly, including as to their qualifications in the area of expertise, and the basis upon which their opinions or conclusions rely

        i. Connecticut courts have held that if one expert provides an opinion, agency may not disregard that opinion without countervailing expert evidence; if two experts provide opinions, the agency may choose which opinion to rely on in making its decision

        ii. Expert testimony is necessary to provide substantial evidence on technically complex issues. Connecticut courts have held that the determination of whether there are impacts to wetlands and watercourses is a technically complex issue requiring expert evidence

            I. DEP's model municipal regulations provides for a complex application fee, which provides a means for agencies to hire experts

    b. Disclosing if an individual commissioner has expertise on which the rest of the agency will rely (engineer, geologist, soil scientist, etc.)

        i. This must be disclosed on the record for each application and other relevant agency proceedings

    c. Deliberating out loud, discussing what facts applied to which factors are crucial to the decision of the Inland Wetlands Agency

4. Some decisions must be made in writing on the record (see Appendix 2: SAMPLE LANGUAGE FOR MOTIONS)

    b. If a public hearing is held because of a potential significant impact, a permit may not be issued until the agency has issued a decision in writing that a feasible and prudent alternative does not exist

    c. If the agency denies permit based on a finding of possible feasible and prudent alternatives, the agency shall propose the types of alternatives which the applicant may investigate

    d. It is good practice and always correct to issue all decisions in writing.

J. Enforcement basics: a variety of tools exist, examples of which are listed below:

1. Informal, often handled by staff

    a. Telephone call

    b. Simple information letter

    c. Letter from agency to explain in writing/at next meeting

2. Formal

    a. Citation (sec. 22a-42g)

        i. Requires a municipal ordinance

    b. Cease and correct order, followed by hearing in 10 days (sec. 22a-44)

        i. Statute authorizes the filing of a certificate of such order with the Town Clerk and the placement of such certificate on the land records

    c. Court proceeding to stop illegal activity or to enforce cease and correct order

Appendix 1:

A CHRONOLOGY OF CONNECTICUT'S WETLAND AND WATERCOURSE PROTECTION

Pre-1972	Connecticut's inland wetlands and watercourses are largely unprotected.
1972	The Inland Wetlands and Watercourses Act is established by the Connecticut General Assembly.
1973	The Act is amended to define Inland Wetlands Agency and to give the Commissioner of DEP the power to protect wetlands and watercourses in municipalities that do not exercise their regulatory authority.
1978	Most municipalities have established an Inland Wetlands Agency. Approximately 30 towns have not and are regulated by the Commissioner of DEP.
1986	Council on Environmental Quality annual report recommends adoption of legislative amendments to the Act to strengthen wetland protection efforts in the State.
1987	The Act is significantly amended. The amendments include: a requirement that the DEP develop a comprehensive training program for inland wetlands agency members; a requirement that the DEP establish a standardized activity reporting form to encourage systematic and accurate reporting of local agency actions; and exemptions for farming activities.
1990	Only 13 municipalities are regulated by the DEP. All others have established an inland wetlands agency.
1995	Every municipality has established an inland wetlands agency. A legislative task force is established to study issues related to the regulation of activities in and around inland wetlands and watercourses.
1996	As a result of the 1995 task force, the Act is significantly amended. The amendments include: a definition of feasible and prudent; factors to consider when applications come before the Agency; and provisions for delegating authority to an agent. In addition, the training program is re-evaluated and changes are made to reflect current needs of municipal inland wetlands agencies.
2003	First significant amendments are made to the Act since 1996 (small amendments to the Act have occurred in the interim years). Primarily, time frames for hearings and the date of receipt of applications are made consistent with Connecticut General Statutes Section 8-7d (zoning laws).
2004	As a result of a State Supreme Court decision, the Factors for Consideration section of the Act is amended to expressly authorize the consideration of aquatic, plant or animal life and habitats in wetlands and watercourses. The amendment also limits an inland wetlands agency's ability to consider such things outside of wetlands and watercourses.
2009	The Act is amended to increase the timeframe for which permits are valid for those permits issued during the period from July 1, 2006 to July 1, 2009.

Appendix 2: **SAMPLE LANGUAGE FOR MOTIONS**

Motion To Approve Application - *public hearing held*

I move to approve the application for the following reasons:

1. A feasible and prudent alternative does not exist because . . .

   For Example:

   (a) the applicant provided convincing documentation that no change in the size of the footprint, or the location of the footprint would decrease the impact

   (b) no alternative proposed is feasible in that . . .

   (c) no feasible alternative is prudent in that . . .

2. After duly considering all relevant factors . . .

   For Example - list as many factors that apply, such as:

   (a) there will be no adverse environmental impact on the wetlands/watercourses

   OR

   there will be minimal adverse environmental impact which will be mitigated by the use of sedimentation and erosion controls as set out in the application (CGS Section 22a-41(a)(1))

   (b) this activity is a one-time activity of limited duration only to occur during July with no adverse long-term impact to the wetlands/watercourses

   OR

   the existence of the building does not pose long-term adverse impact to the wetlands and the short-term impacts during the construction phase are adequately addressed by the report submitted in addition to the application

   OR

   the short-term impacts during the construction phase shall be mitigated by the following conditions: list permit terms (CGS Section 22a-41(a)(3))

   (c) there is no irreversible or irretrievable loss of wetlands/watercourses since the structure can be removed, the watercourse crossing (a bridge) can be removed (CGS Section 22a-41(a)(4))

Motion To Approve Application - *NO public hearing held*

I move to approve the application for the following reasons:

1. After duly considering all relevant factors . . .

   (a) Refer to examples in "Motion To Approve - public hearing held" example 2 above

   (b) Also consider and include, if appropriate, the following factor:

   A feasible and prudent alternative does not exist because . . . (CGS Section 22a-41(a)(2))

Motion To Deny Application - *based on feasible and prudent alternatives*

I move to deny the application because there may be feasible and prudent alternative(s) to the proposed activity which have less adverse impact on wetlands/watercourses. The applicant may investigate the following types of alternatives:

For Example: [List as many as apply]

Reducing the size of the footprint
Shifting the location of the footprint on the site plan
Proposing fewer lots/less intense use/leaving more space between the wetland and the edge of construction
AND SO ON . . .