

Town of Granby Inland Wetlands and Watercourses Regulation Training Session

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The Inland Wetlands & Watercourses Act

Inland Wetlands and Watercourses Act,
Conn. Gen. Stat. Section 22a-36 et. seq.
and local regulation of wetlands

The Inland Wetlands & Watercourses Act - Background

- Regulation of inland wetlands & watercourses governed by IWWA (the “Act”), C.G.S. §§ 22a-36 *et seq.*
- All CT municipalities required to establish inland wetland agencies & implement regulations on or before July 1, 1988.
- DEEP retains jurisdiction to intervene if local agency fails to perform functions properly.
- If agency fails to act on application within designated time limits, applicant may file application with DEEP.

The Inland Wetlands & Watercourses Act (cont.)

- Preamble of statement of purpose of Act may be summarized as follows:
 - The inland wetlands and watercourses of the State are an important natural resource which should be preserved in order to preserve an adequate supply of surface and underground water, recharge and purify ground water, control flooding and erosion, protect wildlife, fish and vegetation.
- Concern is expressed about unregulated activity which can damage, pollute and eliminate wetlands & watercourses – the purpose of the Act is to protect them by “providing an orderly process to balance the need for the economic growth of the state and the use of its land with the need to protect its environment and ecology.”

Local Wetlands/Watercourses Agency - Generally

- Agency performs 5 main functions:
 1. To pass and amend local wetlands regulations;
 2. To determine the boundaries of wetlands and watercourses and then maintain and amend maps of them;
 3. To pass upon permits to conduct regulated activities in wetlands and watercourses;
 4. To enforce local wetland regulations; and
 5. To review and make advisory reports to the agency considering special permit, site plan and subdivision applications.

Local Wetlands/Watercourses Agency – Jurisdiction

- Important Definitions:
 - “Regulated activity” means any operation within or use of a wetland or watercourse involving or removing or deposition of material, or any obstruction, construction, alteration or pollution, of wetlands or watercourses, excluding certain specified activities under § 22a-40.
 - “Wetlands” means land, including submerged land (excluding tidal wetlands), which consist of any of the soil types designated as poorly drained, very poorly drained, alluvial and flood plain by the National Cooperative Soils Survey, as may be amended from time to time, of the Natural Resources Conservation Service of the United States Department of Agriculture
 - “Watercourses” means rivers, streams, brooks, waterways, lakes, ponds, marshes, swamps, bogs, and all other bodies of water, natural or artificial, vernal or intermittent, public or private, which are contained within, flow through or border upon this state or any portion thereof, not regulated under the Tidal Wetlands Act.

Jurisdiction (cont.) – Regulating Outside the Box

- Heavily litigated issue – how far can the agency go?
- Generally, agency can regulate outside of wetlands boundaries only where the outside activities have some effect upon the wetlands themselves.
 - Jurisdiction initially established in *Aaron v. Conserv. Comm'n*, 183 Conn. 532, 5444 (1981), where it was recognized that septic systems outside of wetland boundaries could have the effect of polluting them, so the concept of setback requirements was upheld.
- Regulation of “buffer areas” must (1) be in accordance with agency’s regulations related to activities to be conducted in wetlands/watercourses; and (2) shall apply only to those activities which are likely to impact wetlands/watercourses.

Jurisdiction (cont.) – Regulating Outside the Box

Setback Areas

- Agency must enact regulations governing upland review areas (areas outside of but adjacent to wetlands and watercourses) before it can regulate activities within those areas.
- Buffer or setback areas around wetlands and watercourses are called upland review areas by DEEP.
- Purpose of upland review area is to determine if the activities proposed for the property will have an adverse impact to the wetlands or watercourses.
- A provision for an upland review area does not automatically bar development but allows the agency to decide if there's an impact.

Jurisdiction (cont.) – Not so fast ...

- Efforts made to regulate so-called vernal pools (areas containing pooled water occasionally; mostly in the spring) that are used by various wildlife led to municipal decision that development that impacts species that rely on vernal pools can be denied.
- Supreme Court found that regulated activities did not include upland impacts on spotted salamander that relied on vernal pools for breeding.
 - Avalonbay Communities, Inc. v. Inland Wetlands Comm'n of the Town Of Wilton, 266 Conn. 150 (2003)

Jurisdiction (cont.) – Not so fast

- *Avalon* case lead to amendment to C.G.S. § 22a-41 that struck a balance between competing interests of developers and environmentalists:
 - (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.

Permitted by right activities

(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 Energy and 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;

(2) A residential home (A) for which a building permit has been issued, or (B) on a subdivision lot, provided the permit has been issued or the subdivision has been approved by a municipal planning, zoning or planning and zoning commission as of the effective date of promulgation of the municipal regulations pursuant to subsection (b) of [section 22a-42a](#) or as of July 1, 1974, whichever is earlier, and further provided no residential home shall be permitted as of right pursuant to this subdivision unless the permit was obtained on or before July 1, 1987;

(3) Boat anchorage or mooring;

Permitted by right activities (cont.)

(4) Uses incidental to the enjoyment and maintenance of residential property, such property defined as equal to or smaller than the largest minimum residential lot site permitted anywhere in the municipality, provided in any town, where there are no zoning regulations establishing minimum residential lot sites, the largest minimum lot site shall be two acres. Such incidental uses shall include maintenance of existing structures and landscaping but shall not include removal or deposition of significant amounts of material from or onto a wetland or watercourse or diversion or alteration of a watercourse;

(5) Construction and operation, by water companies as defined in section 16-1 or by municipal water supply systems as provided for in chapter 102,1 of dams, reservoirs and other facilities necessary to the impounding, storage and withdrawal of water in connection with public water supplies except as provided in sections 22a-401 and 22a-403;

(6) Maintenance relating to any drainage pipe which existed before the effective date of any municipal regulations adopted pursuant to section 22a-42a or July 1, 1974, whichever is earlier, provided such pipe is on property which is zoned as residential but which does not contain hydrophytic vegetation. For purposes of this subdivision, "maintenance" means the removal of accumulated leaves, soil, and other debris whether by hand or machine, while the pipe remains in place; and

(7) Withdrawals of water for fire emergency purposes.

Nonregulated activities

(b) . . . 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;

(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; and

(3) The installation of a dry hydrant by or under the authority of a municipal fire department, provided such dry hydrant is only used for firefighting purposes and there is no alternative access to a public water supply. For purposes of this section, “dry hydrant” means a non-pressurized pipe system that: (A) Is readily accessible to fire department apparatus from a proximate public road, (B) provides for the withdrawal of water by suction to such fire department apparatus, and (C) is permanently installed into an existing lake, pond or stream that is a dependable source of water.

(c) Any dredging or any erection, placement, retention or maintenance of any structure, fill, obstruction or encroachment, or any work incidental to such activities, conducted by a state agency, which activity is regulated under sections 22a-28 to 22a-35, inclusive, or sections 22a-359b to 22a-363f, inclusive, shall not require any permit or approval under sections 22a-36 to 22a-45, inclusive.

Determining jurisdiction

- Agency has authority to determine whether it has jurisdiction.
- Regulations can delegate authority to determine jurisdiction.

Enforcement

Agency or enforcement officer

- Cease and desist or correct order
- Show cause hearing within 10 days

Court

- Same type of civil and criminal proceedings as zoning
- Penalties and fines more aggressive-\$1,000 per day- 6 mos. prison
- Penalties paid to DEEP

Attorney general/DEEP enforcement

Private citizen enforcement action- Section 22a-16

Attorney general/DEEP enforcement

Private citizen enforcement action- Section 22a-16

Meetings, Hearings and Decisions

Meetings and Hearing Procedures

- Chairman is in Control
- Public Input
- Parliamentary Procedure and Robert's Rules
- Clarity of Motions and Amendments

- Public Hearing – When authorized

No public hearing unless:

- Commission finds that it “may” have a significant impact
 - Role of preliminary findings re: significant activities
- petition filed within 14 days of receipt by 25 persons requesting hearing
- hearing would be in the “public interest”

- Public Hearing

- Public Hearings
 - General Procedures
 - » Sequence
 - » Time Limitations
 - » Cross Examination
 - » Site visits?

Feasible and Prudent Alternatives

If a hearing is held because the agency believed that activity may have a significant impact, Conn. Gen. Stat. Section 22a-41 (b) (1) provides:

“a permit shall not be issued unless the commissioner finds on the basis of the record that a feasible and prudent alternative does not exist. In making his finding, the commissioner shall consider the facts and circumstances set forth in subsection (a) of this section. The finding and the reasons therefor shall be stated on the record in writing”

Feasible and Prudent Alternatives

- Feasible is “able to be constructed or implemented consistent with sound engineering principles.”
- An alternative is prudent if “economically an otherwise reasonable in light of the social benefits derived from the activity[,] provided cost may be considered in deciding what is prudent and further provided a mere showing of expense will not necessarily mean an alternative is imprudent.”
- Should have plans/drawings showing alternatives considered

• Public Hearing Procedures

- Sequence
- Cross examination
- Site Walks- recommend noticed meetings
- Evidence
 - Exhibits-numbering and logging
 - Demonstrative and electronic exhibits

- Public Hearing Procedures
 - Ex Parte Evidence
 - Permissible and Impermissible
 - Disclose during hearing
 - Sequestering post-hearing correspondence
 - Receipt of staff input

Decisions

- Cannot be based on speculative risk
- Applicant does have burden to demonstrate compliance with regulations
- Impacts on wetlands and watercourses is considered a technical issue so the agency cannot ordinarily disregard expert testimony
 - Agency not required to believe generalized statements of experts
 - Agency can weigh credibility of competing experts
 - Could disbelieve expert if there is an evidentiary basis in the record to do so such as tangible evidence showing that testimony of expert is false or mistaken

Voting

- Quorum
- Voting?
 - Absent for portions of hearing
 - Participation by alternates
- Tie votes

THANK YOU!



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