



Wetlands in the Courts: Recent Cases

Connecticut Association of Wetlands Scientists 13th Annual Meeting

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Survey of Federal and State Court Decisions of Note in 2009



- On the federal side, no blockbuster decisions, primarily refinements of existing case law.
- In the Connecticut state courts, the Supreme Court's Unistar decision, summarized at some length in the Abstract, is very significant.
- Two Connecticut Appellate Court decisions addressing the agriculture exemption in the Inland Wetland and Watercourses Act (“IWWA”), C.G.S. § 22a-36 et seq., are also worth noting.

Federal Cases Interpreting § 404 of the Clean Water Act



- The only U.S. Supreme Court decision in 2009 involving wetlands dealt with the discharge of mine tailing wastes in Alaska, and is of limited applicability here.
- Other federal cases continued to interpret the extent of § 404 jurisdiction following the Rapanos decision in 2006.

Federal Clean Water Act Permitting Authority



- § 404 authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into “navigable waters.”
33 U.S.C. § 1344.
- The Army Corps of Engineers (“ACOE”) issues the permits authorized by § 404 on behalf of the Secretary of the Army.

Jurisdiction



- “Navigable waters” is defined by Congress as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).
- ACOE defines waters of the United States broadly to include traditional navigable waters, tributaries thereto, and “adjacent wetlands” to such waters and tributaries. 33 CFR § 328.3(a)(7).

Recap on Rapanos (2006)



- The U.S. Supreme Court in Rapanos was called upon to determine the extent of federal jurisdiction under § 404.
- The issue was whether the Army Corps had jurisdiction over wetlands that were not immediately adjacent to navigable waters and their tributaries.

Rapanos Plurality Test



- The nine justices split on how to interpret the statute.
- Justice Scalia, joined by three other justices, wrote an opinion which construed the term “waters of the United States” to include only “relatively permanent, standing or continuously flowing bodies of water” and “wetlands with a continuous surface connection to such water bodies.”

Justice Kennedy's Test



- Justice Kennedy, writing for himself, opined that the test is whether the wetlands “possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”
- Wetlands adjacent to navigable-in-fact waters meet the test by adjacency alone.
- Wetlands adjacent to non-navigable tributaries require the finding of a “significant nexus” on a case by case basis.
- Such wetlands would meet the test if they “significantly affect the chemical, physical, and biological integrity” of navigable-in-fact waters.

United States v. Cundiff, 555 F. 3d 200 (6th Cir., 2009)



- In a civil enforcement case for violations of § 404 of the Clean Water Act, the District Court concluded the wetlands were “waters of the United States,” imposed a \$225,000 civil penalty, and granted the government injunctive relief in the form of a restoration plan.
- On appeal, the Sixth Circuit Court of Appeals held that the District Court had found that the wetlands in question met both Justice Scalia’s test and Justice Kennedy’s test and upheld the trial court’s decision.

Will § 404 Jurisdiction Be Clarified?



- Congress is working on legislation to amend the Clean Water Act to clarify the jurisdictional issue.
- The Corps and EPA may adopt regulations to clarify the situation.
- In the interim the two agencies are operating under a joint Guidance as to how to resolve the jurisdictional questions.

Cases Interpreting the Connecticut IWWA



- Unistar Properties, LLC v. Conservation and Inland Wetlands Comm'n of the Town of Putnam, 293 Conn. 93 (2009)
- Town of Canterbury v. Deojay, 114 Conn. App. 695 (2009)
- Red 11, LLC v. Conservation Comm'n of the Town of Fairfield, 117 Conn. App. 630 (2009).

Unistar



- Applicant proposed 34 lot subdivision on 62 acres with five wetlands and two vernal pools.
- No activities proposed within wetlands or watercourses or within the commission's upland review area.
- However, proposed roadway and cul-de-sac would encircle two vernal pools on the property.

Unistar



- During the hearings, the commission requested:
 - A detailed wildlife inventory for the property.
 - An evaluation of alternative designs to mitigate post-development stormwater run-off impacts.
- The applicant did not provide the information requested.
- The commission denied the application as incomplete.

Unistar



- The applicant appealed and the trial court upheld the commission's decision.
- The applicant petitioned for certification to appeal the trial court decision to the Appellate Court, which was granted, and the Supreme Court transferred the appeal to its docket.
- The Supreme Court upheld the right of a municipal wetlands commission to deny an application for incompleteness due to the refusal of the applicant to submit a detailed wildlife inventory or to present design alternatives that might mitigate impacts.
- The Supreme Court's decision interprets the interplay between § 22a-1(c) and 22a-41(d) of the IWWA.

Unistar: Review of § 22a-41 (c)



- § 22a-41 (c) provides: “For purposes of this section, (1) ‘wetlands or watercourses’ includes aquatic, plant or animal life and habitats in wetlands and watercourses, and (2) ‘habitats’ means areas or environments in which an organism or biological population normally lives or occurs.”
 - Added in 2004 to put consideration of ecological impacts back into the statute after the Supreme Court decision in Avalonbay.

Unistar: Review of § 22a-41(d)



- § 22a-41(d) provides: “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.”
 - Added in 2004 to limit commissions’ power to deny or condition applications based on ecological impacts outside the boundaries of wetlands and watercourses.

Unistar



- On the “complete application” issue, the Supreme Court held that a commission must consider the statutory factors in § 22a-41(a) in relation to the aquatic, plant and animal life and habitats that are part of the wetlands and watercourses.
- In doing so, the Court said, the commission is entitled to information on the aquatic, plant or animal life and habitats that are part of the wetlands or watercourses pursuant to § 22a-41(c).

Unistar



- On the interplay between § 22a-41(c) and (d), the applicant argued:
 - The application involved only activities outside the wetland which would cause no impact to the physical characteristics of wetlands or watercourses;
 - § 22a-41(d) did not allow the commission to deny or condition the application on the basis of ecological impacts;
 - Therefore, the commission could not properly request the information.

Unistar



- The Court held for the commission, saying:
 - “[n]othing in § 22a-41 (d) prohibits a commission from requesting information on wildlife in order to determine whether the proposed activity will ‘affect the physical characteristics of such wetlands’ or will impact wildlife outside the wetlands that in turn will ‘affect the physical characteristics of such wetlands.’”

Unistar



- The applicant claimed that it was not required to provide mitigation alternatives for stormwater impacts, because there would be no adverse affect on the wetlands.

Unistar



- The court held:
 - a commission is authorized to request information concerning alternatives to the proposed activity and, significantly, such information permits the commission ‘to determine the likelihood that the proposed activity may or may not impact or affect the resource, and whether an alternative exists to lessen such impact....’, citing to its prior decision in Queach.

Impact of Unistar on §22a-41(d)



- Will any change in stormwater run-off to a wetland or watercourse constitute the “physical change” necessary to avoid the prohibition in § 22a-41(d) if documented in the record?
- If so, it may give commissions the authority to deny or condition applications for activities outside wetlands and watercourses based upon ecological impacts.

Deojay and Red 11:

Review of IWWA Agricultural Exemption



- § 22a-40(a)(1) provides statutory uses as of right which include:
 - “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.”
- Most Inland Wetlands and Watercourses Agencies have adopted regulations incorporating the exemption and providing for a procedure to enable the agency to rule on the applicability of the exemption.

Deojay and Red 11: Limitations on Exemption



- “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 materials from wetlands or watercourses for the purposes of sale....”

Deojay



- Town issued cease and desist order for wetlands violations and sought injunctive relief in court in July of 2006 to prevent the Defendants from cutting trees and working in wetlands on their property.
- Defendants then filed an application in August of 2006 to construct an agricultural pond after the fact, place a shed and construct a driveway within 100 feet of the wetlands, and for permission for construction of a house, a well and a septic system.
- Defendants claimed an agricultural exemption based on their intention to grow blueberries as justification for excavating the farm pond.

Deojay



- In September 2006, the commission approved the application and lifted the cease and desist order on the condition that the Defendants post an \$8,000 bond to ensure that the proposed farming activity would actually take place.
- The bond was never posted.
- The Town proceeded to trial on the injunction in July & August, 2007.

Deojay Trial Court Decision



- The trial court enjoined the Defendants from continuing any work on the property until they posted the bond requested by the commission or otherwise brought themselves into compliance with the regulations.
- The trial court assessed a \$10,000 penalty together with costs, expert witness fees and the Town's attorney's fees.
- Defendants appealed.

Deojay Appellate Court Decision on Agricultural Exemption



- Defendants claimed the trial court erred:
 - in determining their agricultural use not exempt; and
 - in granting an injunction against their continued agricultural use of their property.
- The Appellate Court held that the determination of the existence of the exemption was for the wetlands commission not Defendants or the court.
- The Appellate Court affirmed the judgment of the trial court.

Red 11



- Plaintiff appealed three cease and desist orders to Superior Court, claiming that its activities were exempt from the Town's jurisdiction under the agricultural exemption in the IWWC.
- The trial court upheld the orders.
- Plaintiff appealed to the Appellate Court.

Red 11's Jurisdictional Argument



- Plaintiff claimed the commission lacked jurisdiction to enforce the cease and desist orders, because, following the first order, the commission issued a declaratory ruling confirming that the agricultural exemption applied to some of its activities.

Appellate Court's Response



- Appellate Court rejected that argument, saying that the plaintiff conducted activities which the commission had clearly indicated in its initial ruling were not covered by the exemption, and therefore the commission had jurisdiction to enforce the subsequent cease and desist orders.

Red 11's Reclamation Argument



- Plaintiff claimed the trial court misinterpreted the limitation language applicable to the farming exemption.
- Specifically, it argued that the limitation on reclamation in the farming exemption applied only to wetlands and watercourses with continual flow.

Appellate Court Response



- Appellate Court rejected the reclamation argument holding that the actual language “filling or reclamation of wetlands or watercourses with continual flow” meant that the legislature intended “continual flow” only to modify “watercourses” not “wetlands,” therefore the reclamation of any wetland is not part of the “as of right” exemption from permitting requirements.

Red 11's Farm Pond Argument



- Among the activities subject to enforcement actions by the Town was the draining and excavation of a vernal pool to create a pond for irrigation.
- Plaintiff argued a farm pond of less than three acres was exempt as of right from permitting.

Appellate Court's Response



- The Appellate Court rejected the argument, noting that it was up to the Plaintiff to establish that the pond was “essential to the farming operation,” as set forth in the statute.
- The Court noted that the Commission never made the determination that replacement of the vernal pool by the pond was essential to the farming operation.

Summary of Court Decisions on Agricultural Exemption



- The legislature has provided that certain agricultural activities are uses as of right.
- The court decisions say the land owner must request the commission to declare the specific use is exempt before undertaking any activities, or run the risk enforcement by the commission.
- For a thoughtful article on the two decisions from a commission's perspective, see J.P. Brooks, Esq., "Farming Exemption Considered by the Appellate Court," The Habitat, Vol. 21, No. 4, Fall 2009.



Questions?



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