

# Connecticut's Inland Wetlands and Watercourses: Permit Denials

## *Outline of Presentation by The Attorney General's Office*

**Overtaken decisions of wetlands commissions have generally fallen into three categories:**

### **A. Errors as a matter of fact: trouble with experts**

#### 1. Experts: do you need any?

a. Lay commissioners may rely on their personal knowledge concerning matters "readily within their competence:" such as flood levels observed during storm of record.

b. Commissioners with expertise may be relied on by the commission IF the commissioner's expertise has been disclosed and the applicant is given a chance to rebut the expert opinion.

c. A lay commission acts without substantial evidence and arbitrarily when it relies on its own knowledge and experience concerning technically complex issues such as pollution control, in disregard of contrary expert testimony.

d. Credibility of witnesses is a matter within the province of the commission, BUT a commission cannot disregard the only expert evidence on the issue when agency members lack their own expertise or knowledge.

e. The lack of a witness in support of the commission's decision is a primary reason for denials being reversed on appeal.

f. Some agencies will require expert testimony for every application because the municipal regulations require consideration of complex pollution issues for each application.

#### 2. Lack of resources to finance experts

a. If your town does not provide a budget sufficient to cover the costs of hiring experts to advise you in the processing of applications or the monitoring of compliance with permits, rely on the statutory provision to assess fees sufficient to carry out your legal duties.

b. "The inland wetlands agency may require a filing fee to be deposited with the agency. The amount of such fee shall be sufficient to cover the reasonable cost of reviewing and acting on applications and petitions, including, but not limited to, the costs of certified mailings, publications of notices and decisions and monitoring compliance with permit conditions or agency orders." § 22a-42a(e) of the General Statutes.

c. Adopt a regulation that establishes a fee schedule sufficient to fund your duties. Follow the mandatory procedure for adopting regulations in § 22a-42a(b). Amend the fee schedule as needed for budgetary shortfall from your town.

#### 3. When you have an expert:

a. Testimony about "potential" or "risk" is insufficient for denial.

b. The higher the certainty of probability of the opinion the more likely your commission decision will be upheld.

### **B. Errors as a matter of procedure**

#### 1. Personal or financial interest of agency member:

a. "No member or alternate member . . . shall participate in the hearing or decision of such . . . commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense. In the event of such disqualification, such fact shall be entered on the records of such . . . commission." § 22a-42(c). "Personal" can include membership in an organization that is the applicant or affected party. "Indirect" can include family members.

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- b. The decision to disqualify a member must arise from the member; the chair or others can not order the disqualification of a member.
- c. The appearance of a conflict is sufficient to disqualify a member.

2. Fundamental fairness

a. “The only requirement in administrative proceedings is that the conduct of the hearing shall not violate the fundamentals of natural justice.”

b. This includes:

1. notice of meeting;
2. no one with the burden to prove something denied the right to produce relevant evidence or cross-examine witnesses of the opponent;
3. right to offer rebuttal evidence;
4. no ex parte consideration of evidence (all evidence must be presented at public meeting available for public to examine);
5. agency members shall be unbiased: “bias can take the form of favoritism toward one party of hostility toward the opposing party; it is a personal bias or prejudice which imperils the open-mindedness and sense of fairness.” “The law doesn’t require members of . . . commissions to hold no opinion.” The issue is whether a member has made up his/her mind before the meeting, regardless of any arguments that would be advanced.

**C. Errors as a matter of law**

Environmental issues in general: Inland wetlands agencies are not “mini-EPAs”; there are valid environmental matters that are beyond the reach of the wetlands act to regulate.

Other societal issues are outside your jurisdiction.

Groundwater, in and of itself, is not regulated under the wetlands act.

Groundwater impacts that then impact wetlands or watercourses come within the act, if the agency properly establishes the nexus between those resources.

Acting outside the authority of the wetlands act: Your authority and duties are established by the wetlands act. Agencies may not create new authority, such as establishing an insurance fund for property owners whose drinking water wells are contaminated by applicant whose permit was granted.

Exemptions: Agencies must allow activities that fall within the statutory exemptions even though the activities have an adverse effect on wetlands and watercourses.

Exemptions: Agencies are not authorized to change the exemption, making them harder for applicants to meet.

Definition of regulated activity: if agency’s definition doesn’t include any activity which impacts are likely to have adverse impact on wetlands or a watercourse, the agency cannot regulate impact outside of upland review area.

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