2015 CONNECTICUT SUPREME COURT YEAR IN REVIEW
Rulings Put Limits on State Regulators and Intervenors

Court reins in authority of DEEP in water diversion case

By EMILEE MOONEY SCOTT

While this had overall been a quiet year for environmental matters at the Connecticut Supreme and Appellate courts, two cases released this summer significantly clarify the scope of the Department of Energy and Environmental Protection's authority and the scope of intervention under Connecticut General Statutes §22a-19. Regulated entities will likely use both of these decisions to resist overzealous regulators and intervenors.

Limits on DEEP Authority

In the recent case Tilcon Connecticut v. Commission of Environmental Protection, the Connecticut Supreme Court recognized significant limits on the authority of the DEEP under the Water Diversion Act, C.G.S. §22a-365 et seq. While the court's decision was specific to the act, the analysis can readily be applied to other statutory schemes to limit DEEP's authority to call for extensive (some would say excessive) information from regulated entities.

Tilcon Connecticut Inc. owns and operates five facilities around the state for earth materials excavation and processing. In 2003, Tilcon submitted five applications for water diversion permits (one for each facility) to bring its then-existing diversions into the permitting program as required under C.G.S. §22a-368a. DEEP also delayed action on a National Pollutant Discharge Elimination System permit for the North Branford facility.

In 2008, Tilcon sought a declaratory ruling from DEEP as to three questions (as reframed by DEEP and analyzed by the court): 1) whether the permit application process under the Water Diversion Act authorized DEEP to “request information concerning, and essentially regulate, the plaintiff’s excavation activities and the environmental effects of those activities”; 2) whether the act authorized DEEP’s request for a wetlands mitigation plan; and 3) whether DEEP was authorized to delay the North Branford facility's water discharge permit due to the pending application for a water diversion permit. DEEP's declaratory ruling endorsed DEEP authority with respect to all three questions, and was upheld on appeal to a trial court. Through a series of appeals and cross-appeals, the matter reached the Connecticut Supreme Court.

With respect to the first question, whether DEEP could regulate Tilcon's excavation activities through the Water Diversion Act, DEEP argued that it was entitled to regulate such activities either as diversions themselves or as effects of the proposed diversions. Relying on the broad language of the act, DEEP argued that it was entitled to examine “all aspects of the plaintiff’s activities that may constitute diversions” (emphasis in original). The court disagreed, concluding that DEEP was only empowered to examine the specific proposed diversion that was the subject of the permit application, along with other diversions that may have an “inextricable hydraulic connection” to the proposed diversion. The court further concluded that the excavation activities were not “effects” of the diversion, and that if the legislature had intended for DEEP to review activities facilitated by a diversion, it could have used language to that effect.

The court also concluded that the act does not authorize DEEP to request a wetlands mitigation plan for activities authorized by a municipal permit. Tilcon's North Branford facility had, decades earlier, obtained a municipal permit authorizing it to conduct certain activities in wetlands. The court concluded that while DEEP was authorized to request information on the wetlands, it overstepped such authority by requesting a wetlands mitigation plan. While it would have been permissible to request information to evaluate the impacts of the proposed diversion on the wetlands, DEEP was instead attempting to regulate Tilcon's prior excavation activities, which had properly been the subject of the municipal permit.
Finally, the court concluded that DEEP was not authorized to delay action on the North Branford facility’s water discharge permit application due to the pending application for a water diversion permit. At the North Branford facility, Tilcon had proposed to divert 2 million gallons per day of stormwater (subject to a diversion permit) and discharge it to a watercourse (subject to a discharge permit). DEEP noted that R.C.S.A. §22a-430-4(d)(3) permits it to delay processing a complete discharge permit application “if it is associated with another application which is incomplete or which may be denied.” The court concluded that the discharge permit decision may be delayed only if an associated discharge permit application is incomplete or may be delayed. A decision on the discharge permit may not be delayed based on the pending diversion permit application.

While the court’s analysis focused closely on the text of the act and permitting regulations, regulated entities will likely point to Tilcon when seeking to clarify the limits of DEEP’s authority with respect to other permitting programs. The court focused on the precise language of the statutes and the precise issues that DEEP was authorized to examine under those statutes. To the extent that DEEP attempts to use a permitting decision to open the facility’s other activities to broad scrutiny, Tilcon limits those efforts.

**Limits on Intervention**

In Hunter Ridge v. Planning and Zoning Commission of the Town of Newtown, the Connecticut Supreme Court provided important clarification on the limits of intervention under Connecticut’s Environmental Protection Act of 1971 (C.G.S. §22a-15 et seq.).

Hunter Ridge LLC applied for a subdivision permit from the defendant, the Planning and Zoning Commission (PZC) of Newtown. The PZC denied the subdivision application, on the grounds that the subdivision plan did not meet the town’s open space requirements. Hunter Ridge appealed to the trial court, arguing that the open space requirements had not been appropriately applied. An intervenor intervened in the zoning appeal pursuant to C.G.S. §22a-19(a), raising concerns related to the proposed subdivision’s environmental impacts. The trial court accepted evidence that had not been part of the administrative record, then remanded the matter to the PZC for further fact-finding. The PZC concluded that, subject to certain conditions, the proposed subdivision would not “unreasonably pollute, impair or destroy the natural resources on the property.”

The trial court ultimately set aside the PZC’s findings, found that the proposed subdivision would have an unreasonable impact on natural resources and the ecosystem of nearby Taunton Lake, and enjoined Hunter Ridge from developing a portion of its property without meeting certain conditions set by the court. The trial court did not address Hunter Ridge’s underlying arguments about the town’s open space requirements and awarded costs to the intervenor.

On appeal, the Supreme Court concluded that while C.G.S. §22a-18(a) generally provides for injunctive relief under the Environmental Policy Act, it does not give a trial court authority to enter an injunction where such injunction is not available in the underlying judicial action. As the court said, an “intervenor under §22a-19 must take the proceeding as he finds it at the time of his intervention” and is not permitted to expand the scope of analysis or remedies available beyond those allowed in the underlying proceeding. Following the same reasoning, the court also concluded that C.G.S. §22a-18 (b) through (d) (concerning the scope of judicial review) apply only to independent actions brought under C.G.S. §22a-16 and do not “enlarge the powers of a trial court hearing an action in which an intervenor has raised environmental claims pursuant to §22a-19.”

It is important to note that the intervenor had intervened in a zoning appeal. In contrast to some other types of proceedings, in a zoning appeal the trial court sits in its limited capacity as an appellate tribunal. It is not charged with fact-finding and does not have the authority to enter injunctive relief. As the court stressed, “permitting an intervenor to raise claims for injunctive relief in an administrative or zoning appeal would entirely change the character of the proceedings by potentially requiring the trial court to engage in fact-finding and empowering it to grant sweeping relief not otherwise permitted in such a limited proceeding.” The court noted, however, that the intervenor would have been able to introduce new evidence and seek injunctive relief had he pursued an independent declaratory action under C.G.S. §22a-16.

While the Supreme Court has consistently held that intervenors under C.G.S. §22a-19 may not expand the scope of the analysis, Hunter Ridge clarified that intervenors also may not expand the scope of remedies available. Along with prior case law on intervention, Hunter Ridge will squarely limit matters subject to intervention to the original scope and remedies.

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