

## WHAT'S SUBSTANTIAL EVIDENCE FOR INLAND WETLANDS & WATERCOURSE COMMISSIONS?

Mark Branse, Esq.

### **MUST HAVE A LINK BETWEEN THE ACTIVITY AND HARM TO THE WETLANDS/WATERCOURSE ON THE SITE; MORE THAN MERE SPECULATION**

- In an inland wetlands decision there must be substantial evidence that an adverse impact on wetlands or watercourses will result from the proposed regulated activities and the agency's decision must be supported by "more than a possibility of adverse impact" *River Bend Associates v. Conservation and Inland Wetland Comm'n*, 269 Conn. 57, 69 (2004).
- The adverse impact must be to the wetlands or watercourse **ON THE SITE**. *River Bend* at 75.
- "[A]n impact on the wetlands that is speculative or not adverse is insufficient grounds for denial of a wetlands application." *River Bend* at 79 n.28.
- "[The Supreme Court's] prior case law [does] not authorize the denial of a wetlands application due to uncertainty as to the impact of a proposed activity on wetlands and watercourses." *River Bend* at 79 n.28,
- "The substantial evidence test is not met by a general statement by an expert that 'some type' of adverse impact is likely to result from the proposed regulated activities." *Three Levels Corp. v. Conservation Comm'n*, 148 Conn. App. 91 (2014).

### **GENERAL ENVIRONMENTAL IMPACT IS NOT SUBSTANTIAL EVIDENCE OF ADVERSE IMPACT TO THE WETLANDS/WATERCOURSES**

- "Evidence of general environmental impacts, mere speculation, or general concerns do not qualify as substantial evidence." *River Bend* at 71.
- "[A] finding of potential generalized impacts is insufficient to support a denial of an application for a permit to conduct a regulated activity. The commission must make a determination that the activity will have a likely adverse impact on the wetlands and watercourses and that finding must be supported by substantial evidence in the record." *Comacchia v. Environmental Protection Commission*, 109 Conn. App. 346, 356, 951 A.2d 704 (2008).

### **THE CREDIBILITY OF WITNESS IS WITHIN THE SOLE PROVINCE OF THE COMMISSION, BUT...**

- "While ... an administrative agency is not required to believe any of the witnesses, including expert witnesses... It must not disregard the only expert evidence available on the issue when the commission members lack their own expertise or knowledge." *Tanner v. Conservation Comm'n*, 15 Conn. App. 336, 341 (1988).
- [I]n the absence of countervailing expert testimony, where the commissioners themselves do not possess relevant technical expertise, a commission may not draw inferences which undermine an expert's site specific opinion. *United Jewish Center v. Brookfield*, 78 Conn. App. 49, 60 (2003).

- “[A] lay commission acts without substantial evidence, and arbitrarily, when it relies on its own knowledge and experience concerning technically complex issues ... in disregard of contrary expert testimony....” *Feinson v. Conservation Comm'n*, 180 Conn. 421, 429 (1980).

**No SUBSTANTIAL EVIDENCE WHERE:**

- Testimony that a detention basin could fail but NO EVIDENCE of what would happen if it failed. *Estate of Machowski v. Inland Wetlands Comm'n*, 137 Conn. App. 830, 840 (2012) (“[e]vidence regarding potential impacts to wetlands *in the event* of a failure of the detention basin does not itself amount to substantial evidence” (emphasis in original)).
- Evidence that some sediment and siltation would enter the wetlands or watercourse, but NO EVIDENCE that the amount would harm the wetlands or watercourse. *AvalonBay v. Inland Wetlands and Watercourse Comm'n*, 130 Conn. App. 69, 78 (2011) (the [commission] could not simply assume that the entry of sediment and siltation would adversely affect the wetlands and watercourse without evidence that it would in fact do so.”).
- Evidence that during construction trucks would cross bridge over wetlands + statement by vice chair that “it doesn’t take a rocket scientist to figure out that sometimes cars drop oil, and salts get into the wetlands and all kinds of things happen” because vice chair did not hold herself out as a qualified pollution expert and her concerns were merely speculative. *Lord Family of Windsor LLC v. Inland Wetlands and Watercourses Comm'n*, 103 Conn. App. 354, 363-64 (2007).
- Evidence of a project's density but NO EVIDENCE that the density will cause an adverse impact. *Toll Bros. v. Inland Wetlands Comm'n*, 101 Conn. App. 597 (2007) (“any connection between the project's density and a likely impact on the wetlands is merely speculative”).
- Evidence that elements (nitrogen, copper & zinc) would disperse into the wetlands but NO EVIDENCE that any specific harm would therefore occur. *River Bend Associates v. Conservation and Inland Wetlands Comm'n*, 269 Conn. 57, 81 (2004).