The Reach Of *Queach*: Regulation Outside of Wetlands and Watercourses After *Queach Corporation* v. *Inland Wetlands Commission*, 258 Conn. 178 (2001)

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The Connecticut Supreme Court is not in the habit of giving advisory opinions on the state of the law; nevertheless, its handling of a specific case sometimes affords it the opportunity to comment on the "long view" of how the law has evolved to the point in controversy. In *Queach Corporation* v. *Inland Wetlands Commission*,[2] the Court took such a retrospective glance at certain of its environmental law precedents. The Court considered a challenge to a routine amendment to a municipal inland wetlands commission's regulations as an opportunity to reaffirm its early commitment to a broad interpretation of the Inland Wetlands and Watercourses Act ("I.W.W.A."; "the Act"),[3] that it had handed down in the leading case, *Aaron* v. *Inland Wetlands Commission*,[4] twenty years previously. Although this article will discuss the particular issues raised and decided in *Queach*, it is this overarching background that lends to this latest decision of the Court its real significance, and which must be appreciated, too.

Without question, the salient aspect of this decision's treatment of the Act is the extent of authority to regulate outside the boundaries of the designated inland wetland and watercourse natural resources. The decision in *Queach* effectively quashes a lingering—and persistent--argument from some quarters that amendments to the I.W.W.A. during the intervening period giving attention to regulation outside the resource proper (*i.e*., "uplands," so called) in what is now codified as Section 22a-42a(f) of the Act, effected a change in direction and a scaling back

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[2] 258 Conn. 178, 779 A.2d 134 (2001).
[3] Conn. Gen. Stat. §§ 22a-36 to 22a-45.
[4] 183 Conn. 532, 441 A.2d 30 (1981).

of the regulatory authority of municipal commissions.[5] On the contrary, *Queach* indicates that the Court remains comfortable with an interpretation of the Act that affords broad scope to the ability to regulate consistent with the legislative charge set forth in the preamble.[6] The following issues raised and discussed in the decision illustrate this observation.

Regulated Activities: *Queach* makes unmistakable the necessary distinction to be drawn between "resource conservation" and other forms of land use control where the nature and extent of regulation is more rigidly defined (*e.g.*, zoning setbacks and enumerated uses); it reemphasizes the point that the subject of regulation is a *resource* ("wetlands" and "watercourses"), and that the object of regulation centers about the concept of "impact." This distinction is as old as the *Aaron* case, where the Court rejected a challenge to a municipal commission's consideration of the impact of sewer system components on the adjacent wetlands, notwithstanding the fact that no part of the system was to be sited in the wetlands.[7] Several points in the Court's discussion of this history are noteworthy.

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[5] Public Act 95-313, § 3 ; Public Act 96-157, § 4.

[6] Conn. Gen. Stat. § 22a-36. In fact, this was the initial approach of the Court in the *Aaron* case, stating the obvious point that "[a] statute should be interpreted according to the policy which the legislation seeks to serve." The Court immediately cited to Section 22a-36, *Aaron*, 183 Conn. at 538, language that the Court has regarded as an expression of "a strong public policy in favor of protecting and preserving the natural resources, and particularly the wetlands, of this state[,]" and also as an "emphatic statement of the importance of protecting wetlands . . .." *Commissioner of Environmental Protection* v. *Connecticut Bldg. Wrecking Co*., 227 Conn. 175, 198-99 (1993).

[7] The Court in *Queach* quoted *Aaron* as follows: "An examination of the act reveals that one of its major considerations is the environmental impact of proposed activity on wetlands and watercourses, which may, in some instances, come from outside the physical boundaries of a wetland or watercourse," and then pointedly observed that, "[i]n *Aaron*, we held that activity that occurs in nonwetlands areas, but that affects wetlands areas, falls within the scope of regulated activity." *Queach*, 258 Conn. at 197-98. In *Aaron*, as in *Queach*, the agency's definition of "regulated activity" was in issue. The regulations of the Town of Redding had defined "regulated activity" as encompassing not only "any operation *within*, or use of, a wetland or water course involving removal or deposition of material, or any obstruction, construction, alteration or pollution, of *such wetlands or watercourses*," but also the "location of any portion of any subsurface waste disposal system *within* 200 feet of the mean water line of [certain enumerated rivers, ponds and reservoirs]; 150 feet of such water line of all other water courses and 50 feet of all wetlands *is deemed* a regulated activity. . .." *Aaron*, 183 Conn. at 541-42, n.10 (emphasis added). When presented with the argument that this definition of "regulated activity," implicating as it did the concept of "setback," exceeded the scope of the I.W.W.A., the Court rejected it by appealing to an interpretation of "environmental impact" that was based upon both direct and indirect causation in keeping with the statute's references to "*any* use," "*any* alteration or pollution" of these resources. *Id*. At 542, quoting Conn. Gen. Stat. § 22a-38(13) [definition of "regulated activity"]. This approach was repeated, nearly verbatim, by the Court in *Queach*. *Queach*, 258 Conn. at 195-96.

The Court's interpretation of Section 22a-42a(f), which provides that an inland wetlands agency may regulate activities outside of wetlands or watercourses " '[i]f [the agency] regulated activities within areas around wetlands or watercourses" *and* "those activities . . . are likely to impact or affect wetlands or watercourses,' " emphasized the Act's requirement that such regulation be "in accordance with" the agency's consideration of applications for activities "to be conducted *in* wetlands or watercourses," *and* that such regulation applies *only* to activities "likely to impact or affect" these resources. Section 22a-42a(f) so completely squares with the earlier analysis in *Aaron* that the Court stated in *Queach* that this 1996 amendment "effectively codifies our previous statement in the seminal case of *Aaron* . . .."[8] Moreover, the Court also reviewed its post-*Aaron* and pre-amendment precedents and found them in accord with this view as well, referring approvingly to its decisions in *Mario* v. *Fairfield*,[9] and *Cioffoletti* v. *Planning & Zoning Commission*.[10] The Court specifically noted, even prior to beginning its analysis of Section 22a-42a(f) that the legislature had, in adopting the amendment, made *no* changes to the "broad legislative purpose" of the I.W.W.A., thereby confirming the correctness of the Court's previous interpretations of the Act.[11]

The plaintiffs in *Queach* had pointedly attacked the Branford commission's "catch-all" provision in its definition of "regulated activity," providing that "[t]he Agency may rule that any other activity located within such upland review area or in any other non-wetland or non-watercourse area is likely to impact or affect wetlands or watercourses and is a regulated activity." This language had been suggested to the municipal agencies in the Department of Envi-

[8] The Court thus referred to the addition of Section 22a-42a(f) as providing "express authority for municipal agencies to regulate areas that extended beyond designated wetland boundaries." *Queach*, 258 Conn. at 183. By virtue of the Court's prior interpretation of the Act, the authority to regulate in this manner was, necessarily, "implied."
[9] 217 Conn. 164 (1991).
[10] 209 Conn. 544 (1989).
[11] *Queach*, 258 Conn. at 197-98.

ronmental Protection's ("DEP") *Guidelines for Upland Review Area Regulations* (1997). The Court addressed this claim with economy, since the analysis contained in the case law to date, and the bare language of the Act itself, readily disposed of the issue. The same regulatory considerations come into play regardless of whether one is addressing a proposed activity within the upland review area or beyond it: Will the activity likely impact or affect the wetlands or watercourses?[12] Thus, there is *no* support for the proposition that the mere siting of a proposed activity beyond any designated upland review area renders it immune from regulation; the entire regulatory regime is predicated upon "*impact*" and not upon *distance*.

Setbacks or "upland review areas" thus have two discrete but related functions. First, they establish the zone within which the municipal inland wetland agency will consider impacts or effects on wetlands or watercourses posed by proposals for development. They are an expression of the likelihood that development activities within that lateral distance of the natural resources might cause an adverse environmental impact. According to the DEP's *Guidelines,* the regulatory setback drives review of construction activities on the expectation that "most of the activities which are likely to impact or affect these resources will be located in that area."[13] This is only a regulatory "presumption," as the *Guidelines* note, which means that a person proposing to conduct a regulated activity within this area has the burden of demonstrating that the environmental impacts associated with the proposal are consistent with the "purposes and provisions" of the Act. The upland review area is *not* a prohibitory buffer against development: a demonstration of no impact, or of acceptable impact, as outlined in the factors for consideration contained in Section 22a-41 of the Act, should lead to permit issuance.[14] The *Guidelines* state, correctly, that "[t]he inland wetland statutes do not authorize a blanket prohibition of all activities either in

[12] *Queach*, 258 Conn. at 198 n.23.
[13] *Id*. at 5.
[14] *Queach*, 258 Conn. at 199-200.

the wetlands or in upland review, buffer or setback areas."[15] The Court in *Queach*, validating the approach taken in the *Guidelines*, cautioned against "confusing the commission's authority to *regulate* activity with the commission's authority to *prohibit* activity . . . [T]he upland review process does not forbid activity based solely on proximity [*i.e*., distance] to wetlands. Rather, the upland review process merely provides a basis for determining whether activities will have an adverse *impact* on the adjacent wetland or watercourse, and if necessary, regulating them."[16]

Secondly, regulatory upland review areas function as an administrative expression of wetlands and watercourses management. For example, they provide notice to the public, as the DEP *Guidelines* explain:

> In addition to implementing the law to protect wetlands and watercourses, regulations inform the public on what to expect if one proposes an activity in or affecting a wetland or watercourse in the subject town. Upland review area regulations reduce or eliminate the need for case-by-case rulings by providing notice as to what activities need wetland permits. By specifying where a permit is required, such regulations foster consistency and are convenient for the public.[17]

In addition to notice to the public, such regulations provide advance notice to the inland wetland agencies themselves of activities that might have an impact upon or affect these natural resources.[18] The Court described a variant of such regulations in *Mario* as "a valid administrative device reasonably designed to enable the commission to protect and preserve the wetlands . . .."[19] *Queach* confirmed the validity of this administrative function of the upland review area

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[15] *Guidelines*, at 5. The legislature's removal of the term "buffer" from Section 22a-42a(f) was likely in recognition that "buffer" connotes "prohibition" or "exclusion," a point emphasized by DEP in choosing the term "upland review area" a better communicating the nature of the process, that being upon *review* of regulated activities on a case-by-case basis rather than by reference to their location alone.
[16] *Queach*, 258 Conn. at 199 (original emphasis).
[17] *DEP Guidelines*, at 2.
[18] *See Mario*, 217 Conn. at 172.
[19] *Id*. The regulation at issue in *Mario* required owners of property upon which were located regulated resources to obtain a "certificate of wetlands conformance" prior to erecting any structure on the non-wetlands portion of the parcel.

regulations.[20] The Court concluded that the establishment of such an area (and, in this particular case, an increase in the lateral extent of it) "does not automatically prevent or bar development . . . but provides the commission with a trigger for reviewing whether activity is likely to affect the wetlands or watercourses."[21]

Therefore, the presence of the "catch-all" provision in the Branford regulations, based upon one of the models set forth in the *Guidelines*, emphasizes the point that, notwithstanding the requirement that a permit be obtained for conduct involving regulated activities within an upland review area, a wetlands agency retains authority to regulate proposed activities located more distantly *if* it finds that the activities are likely to have an impact upon or affect a wetland or watercourse. The decision in *Queach* unequivocally supports that assertion of regulatory authority.

Finally, it is worthwhile noting what may seem to be an obvious point but also one that animates virtually every request for judicial review of agency legislative action under the I.W.W.A., and that is the question of who decides the predicate or preliminary facts that implicate the application of the Act's requirements. In short, who decides whether an activity constitutes an "impact" upon these natural resources? The answer is that, in the first as well as in the last instance, it is the regulatory authority. It was this question that caused the plaintiffs in *Queach* to characterize the Branford regulations' "catch-all" definition of "regulated activity" as beyond the jurisdiction of the agency. The Court, however, in the *Aaron* case and its progeny, and also in collateral cases such as *Cannata* v. *Dept. of Environmental Protection*,[22] has made it clear that the regulatory regime in place that applies to wetlands and watercourses protection is both valid and "administratively necessary," and that even when a specific claim is advanced that a given proposed activity is exempt altogether by the express provisions of the Act, there should

[20] *Queach*, 258 Conn. at 200.
[21] *Id*. at 201.
[22] 215 Conn. 616, 622-29 (1990).

be an administrative determination, in order to assess whether the activity falls within any limiting language of the enactment.[23] Accordingly, it is administratively necessary for a wetlands agency acting in the discharge of its obligations under the Act as enabling legislation to consider the likely impact of proposed regulated activities upon these particular natural resources that the Act has delegated to the agency's superintendence.[24] The oft-repeated language in *Aaron* that many different regulatory schemes may be at one and the same time in conformity with the I.W.W.A., because the enabling legislation "envisages its adaptation to infinitely variable conditions for the effectuation of the purposes of these statutes," is above all else an acknowledgment of the locus of decision making. The legislature, given the fragile and irreplaceable nature of the resource in question, has arrived at an allocation of responsibilities that is local, emphasizing close oversight.[25]

Regulation and Amendment Process: The Court in *Queach* also considered whether the administrative record of the Branford commission's adoption of an amendment to its regulatory setback was legally sufficient. The Court noted that this challenge warranted little discussion, and listed three reasons supporting the decision of the municipal agency, two of which the case law and general principles of administrative law regard as unexceptional and essential: testimony before the inland wetlands agency and the "broad" purpose of the enabling legislation (*i.e.*, the language of the I.W.W.A. itself).

The DEP's *Guidelines* provided the third evidentiary basis for the amendment adoption. The Court noted that this document provided "a detailed explanation regarding the reasonable-

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[23] *Aaron*, 183 Conn. at 547.
[24] Conn. Gen. Stat. § 22a-42(e)("Any ordinances or regulations shall be for the purpose of effectuating the purposes of Sections 22a-36 to 22a-45, inclusive, and, a municipality or district, in acting upon ordinances and regulations shall give due consideration to the standards set forth in Section 22a-41.")
[25] *Aaron*, 183 Conn. at 541; *see also Queach*, 258 Conn. at 200, quoting *Mario*, 217 Conn. at 171-72.

ness of a 100 foot setback."[26] In other words, the Court endorsed the argument that the Commissioner of Environmental Protection's technical reflection upon this topic was appropriately treated as expert evidence for inclusion in the record of the agency's regulation amendment proceeding, and was appropriate, too, for the agency as fact finder to credit in its deliberations. This result is consistent both with the *Guideline's* own characterization of its purpose as providing assistance in the municipal regulation review and revision process, and the Court's deference to the state agency as a regulatory body possessing technical expertise in this area.

Groundwater Impacts: The plaintiffs in *Queach* sought review of the Branford regulation defining as a "significant activity" "any activity which causes a substantial diminution of flow of a natural watercourse, or groundwater levels of the regulated area. . .." The plaintiffs claimed that the promulgation of this provision was beyond the authority of the municipal agency, since groundwater resources were not enumerated among those matters defined as "regulated activities." The Court, however, viewed these provisions as concerning "impacts on wetlands and watercourses, *not groundwater per se*."[27] Again, the analysis is based upon the legislative purpose of the statute, and that purpose is set forth in detail in Section 22a-36. The Court took notice of some obvious impacts of proposed activities upon groundwater such as might be found to constitute an "impact" in or on wetlands and watercourses--dewatering, for example--but concluded more generally still that the Act seeks not only to protect these natural resources from pollution but also to preserve and protect them from disturbance, "whether polluting or not, which could affect their conservation, economic, aesthetic, recreational or other values."[28] Applying this test, the Court concluded that the Branford regulations' reference to groundwater impacts was

[26] *Queach*, 258 Conn. at 201 and n.25.
[27] *Queach*, 258 Conn. at 204 (emphasis added).
[28] *Id*., quoting *Aaron*, 183 Conn. at 551.

"consistent" with the "broad purposes of the act," because the focus remained upon the wetlands and watercourses.

An important caveat exists here, and that is that the Court in *Queach* has *not* sanctioned the regulation of impacts on "groundwater per se" and it said so. Regulation of that resource, and, in particular, the consideration of impacts to and the provision of potable water, is vested in the Commissioners of Public Health and of Environmental Protection.[29] The DEP Commissioner also has authority to define "regulated activities" that may pose a threat to groundwater in an aquifer protection area.[30] The I.W.W.A. itself defines the term "watercourse" in a manner that is not consistent with a non-surface body such as groundwater.[31] Therefore, inland wetlands commissions should be clear about what they are examining: their review is confined to impacts upon wetlands and watercourses; they are *not* looking at the hydrological profile of a site for impacts upon the groundwater regime specifically.

Application To Current Events: Recently, the regulatory status of vernal pools has caused some to question in light of *Queach* "how much farther" inland wetlands and watercourses jurisdiction will extend.[32] Vernal pools are "watercourses" within the parlance of the Act.[33] They are, therefore, fully subject to regulation by the municipal agency, which may evaluate impacts to such a watercourse as might occur from a proposed regulated activity. The posture of the current crop of vernal pool cases (trial level only) differs from this observation insofar as what the agencies have been evaluating is an activity proposed for uplands where the

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[29] Conn. Gen. Stat. § 22a-471. Consideration of the effect of water diversion upon the public water supply and upon "groundwater development" is another delegated power of the Commissioner of Environmental Protection pursuant to the Connecticut Water Diversion Policy Act, Conn. Gen. Stat. § 22a-365 *et seq*. *See* Conn. Gen. Stat. § 22a-373(b)(1) (factors for consideration in permitting water diversions).
[30] See generally, Conn. Gen. Stat. § 22a-354g *et seq*.
[31] *See* Conn. Gen. Stat. § 22a-38(16).
[32] Gregory Sharp's insightful companion article devoted to this issue emphasizes the biodiversity values inherent in the I.W.W.A., and concludes that the decision in *Queach* provides adequate legal authority for the regulatory consideration of these values.
[33] Conn. Gen. Stat. § 22a-38(16).

only "impact" is the interference with the upland habitat of an obligate species of the vernal pool[34]; and whether the impact upon this species, if proved negative, would diminish the biodiversity of the watercourse system and thereby constitute an "impact" to the system. This scenario differs from that often confronted by municipal agencies, because it does not involve the usual and direct harms associated with filling, sedimentation and erosion and other forms of "pollution" to wetlands and watercourse resources.

Queach, of course, did not weigh the legal significance of such "impacts" under the Act. Nevertheless, one cannot ignore the Court's insistence in *Queach* that "impact" is a broad and potentially wide-ranging regulatory consideration (both literally and legally). Three additional observations immediately come to mind. First, the Court's framework of analysis continues to lay particular stress upon the legislative finding in Section 22a-36. The analysis in *Queach* began with this finding as proof of the "broad legislative objectives underlying the [act]."[35] Secondly, although the Act speaks of wetlands and watercourses as an "interrelated web of nature" "essential" to the "existence of many forms of animal, aquatic and plant life," and of the goal of "preventing loss of "fish and other beneficial aquatic organisms, wildlife and vegetation and the destruction of the natural habitats thereof," it nevertheless also speaks to the necessity to "*balance* the need for the economic growth of the state and the use of its land with the need to protect the environment and its ecology . . . in order to guarantee the safety of such natural resources . . .."[36] Thirdly, there is the matter of the Commissioner of Environmental Protection's statutorily

[34] An obligate species, in these cases, the salamander, utilizes the particular natural resource during a portion of its life cycle.
[35] *Queach*, 258 Conn. at 193.
[36] Conn. Gen. Stat. § 22a-36 (emphasis added).

derived authority over wildlife management to be considered, as well as what technical expertise his agency may formally bring to bear upon this topic.[37]

Clearly, the only way to realize the complex goal expressed in Section 22a-36 with a legally adequate sense of "balance" as mandated by the Act is to proceed incrementally and with sufficient facts in order to make considered and careful judgments. Because the regulatory scheme for inland wetlands and watercourses management in this state is so firmly rooted in fact-specific findings, and the case law is driven from below by the decisions of many municipal wetlands agencies, it remains to be seen what the final contours of vernal pool regulation will look like. One can predict that, as in *Queach*, the interplay of the history of the Act, the technical opinions of the DEP and the development of the case law arising from local decision making will all play their part in the process of creating those contours.

In conclusion, the decision in *Queach* affirmed far more than the regulatory amendments at issue in the town of Branford. It reaffirmed the direction that the Court has taken in the interpretation of the I.W.W.A. in the time since its decision in *Aaron* a generation earlier. In every respect, the Court has supported and affirmed the legislative judgment that these natural resources constitute a vital component of our ecology. With respect to the specific issue of the scope of regulation, it is likely that the Court will continue to support the regulatory efforts of municipal wetlands and watercourses agencies so long as these bodies remain faithful to the Act's insistence that the judgments that they make be in relation to "impacts" on the regulated resources, and so long as they make an adequate administrative record of their deliberations.

[37] *See generally*, Conn. Gen. Stat. Title 26 [Fisheries and Game].