Pictured above: Timber Rattlesnake

Application of Connecticut's Endangered Species Act to Private Property:

Prudent Public Policy or Regulatory Rattlesnake?

Gregory A. Sharp and Loni S. Gardner

Photography by Twan Leenders

Introduction

The Connecticut Endangered Species Act ("CESA"),[1] as presently applied to private lands, offers limited protection for the state's endangered and threatened species, but causes substantial private sector development delays and materially increased project costs.

The legislature originally enacted the law in 1989 to ensure that state agency projects did not adversely impact species with populations that are threatened or endangered in Connecticut.[2] Despite the obvious legislative intent for a narrow program applicable to state government projects, the Department of Environmental Protection ("DEP") subsequently re-interpreted the law and began to apply CESA to private projects through various administrative approval processes in the agency.

In 1997, the Commissioner inserted a requirement in a variety of General Permits issued under various DEP statutes to the effect that the activity subject to the General Permit "must not threaten the continued existence of any species listed pursuant to Section 26-306 of the Connecticut General Statutes as endangered or threatened and must not result in the destruction or adverse modification of habitat designated as essential to such species…." This generic General Permit condition imposed by the agency without any specific legislative authority broadened the Act's reach to private sector projects.

In 2001, the Army Corps of Engineers ("Corps"), at the behest of the DEP, reissued its Programmatic General Permit ("PGP") for Connecticut with a new exclusion from the non-reporting category for projects with impacts to threatened or endangered species or species of special concern, even if the amount of fill proposed in federally regulated wetlands and watercourses was less than 5,000 square.[3] From that time forward, a CESA review has been required as part of the Corps permitting process in Connecticut.

As a result of these DEP initiatives, both large and small private development projects have faced unexpected hurdles and delays, particularly in suburban and rural areas of the state. There are two common sources of delay. First, project managers, unaware of the CESA requirements embedded in the DEP General Permits or the Corps PGP, have not undertaken a state endangered species review prior to seeking their approvals. Second, if surveys confirm the presence of these species or their essential habitats, DEP may request mitigation in the form of preservation of habitat, creation of habitat, or payment to a fund for research and management of listed species and acquisition of habitat. Negotiation of a DEP request for mitigation is typically time consuming.

The heart of the problem lies in the fact that the CESA itself provides no authority

for requiring private parties undertaking development projects to obtain a permit under the Act.[4] Therefore, unlike states like Massachusetts, Connecticut has no permit process per se for private parties to follow when seeking to disturb land that might be considered as essential habitat for one of the listed species.

The two regulatory processes which most often trigger CESA review are the General Permit for the Discharge of Stormwater and Dewatering Wastewaters Associated with Construction Activities ("General Permit for Stormwater from Construction Activities"), and the water quality certification issued by DEP in connection with the Corps PGP for Connecticut for activities in wetlands regulated by the federal Clean Water Act.[5] As a result, essential habitat that is modified or destroyed by a project that does not require one of these permits, is not protected.

An Overview of CESA

CESA establishes a program for the protection of state endangered and threatened species and so-called species of special concern within the DEP.[6] It is analogous to the federal Endangered Species Act,[7] but it is focused solely on the status of species in Connecticut. As a result, a species may be listed as endangered or threatened in Connecticut, because, for example, it is at the extreme edge of its range, even though healthy populations exist elsewhere in the country, and, therefore, it is not listed as federally endangered or threatened.

The Act authorizes the Commissioner to adopt regulations establishing procedures for determining the status of native species as endangered, threatened, or species of special concern, listing native wildlife and native plants determined to be in those three categories, identifying the essential habitats for endangered and threatened species, and establishing criteria for petitions to add or remove species from the respective lists of species or identified essential habitats.[8] The Commissioner is obligated to review the designated species lists and essential habitats every five years.[9]

The legislation defines endangered species as those federally endangered as well as those native species documented to be in danger of extirpation throughout all or a significant portion of its range in Connecticut;[10] threatened species as those native species documented to become endangered in the foreseeable future;[11] and species of special concern as native plant species or non-harvested wildlife documented to have a naturally restricted range in the state, to be at a low population level or to be in such high demand that unregulated taking would be detrimental to conservation of its populations, or to have been extirpated from the state.[12]

To date, the Commissioner has listed under the three categories more than 500 plant and animal species, including 11 species of mammals, 50 species of birds, 11 species of reptiles, 7 species of amphibians, 7 species of fish, 150 species of insects, and 343 species of plants.[13] Because of the sheer number of species and the variety of habitats in which they exist, it is not unusual to find one or more of them, particularly on large undeveloped tracts of land.

> The heart of the problem is that the CESA provides no authority for requiring private parties undertaking development projects to obtain a permit.

Significantly, the Commissioner has adopted no regulations identifying essential habitats for endangered or threatened species, therefore the only way a project proponent can determine definitively whether the project property contains listed species or their habitats is through a field survey.[14]

The operative provisions of the CESA are Sections 26-310 and 26-311. The former is titled "Actions by state agencies which affect endangered or threatened species or species of special concern or essential habitats of such species." It requires

> each state agency, in consultation with the commissioner, …[to] conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded, or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species, unless such agency has been granted an exemption as provided in subsection (c)….

Conn. Gen. Stat. § 26-310(a).

Subsection (b) requires each state agency responsible for the primary recommendation or initiation of action which may significantly affect the environment to ensure that such actions are consistent with the CESA, and it authorizes the Office of Policy and Management to determine such consistency in the context of an environmental impact evaluation prepared pursuant to the Connecticut Environmental Policy Act ("CEPA").[15]

Subsection (c) provides OPM with the power to grant an exemption under certain circumstances if a proposed agency action would violate the provisions of subsection (a) or (b).

Subsection (d) authorizes OPM to determine on a case-by-case basis that a proposed action would not reduce the likelihood of survival or recovery of an endangered or threatened species but would result in an incidental taking, and, if so, requires OPM to provide the agency with a statement specifying the impact of the incidental taking, specifying feasible and prudent measure and alternatives, and imposing conditions, including reporting requirements. An incidental taking in compliance with OPM's measures and conditions is deemed not to be prohibited by the CESA.

Section 26-311 is titled "Taking of endangered or threatened species. Construction of chapter." Subdivisions (a) (1) and (2) prohibit certain forms of intentional taking of

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endangered or threatened species. Subdivision (a) (3) prohibits state agencies from modifying essential habitat of endangered with threatened species. Subsection (a) contains no similar prohibition against private parties modifying essential habitat. Moreover, subsection (b) provides a safe harbor for private property owners from conducting otherwise lawful activities from which an incidental taking may occur. Specifically, section (b) provides that nothing in CESA or regulations adopted pursuant to CESA:

> [S]hall prohibit a person from performing any legal activities on his own land that may result in the incidental taking of endangered or threatened animal and plant species or species of special concern.

Conn. Gen. Stat. § 26-311(b).

Despite the clear statutory safe harbor of Section 26-311(b) for private property owners, however, the DEP has premised the imposition of a CESA condition in its General Permits based on the language of Section 26-310(a), which requires that each state agency ensure that any "action authorized" by the agency does not "threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species."[16] In other words, DEP has interpreted the issuance of a permit to a private party to conduct an activity on private land as an "action authorized" by the agency within the meaning of Section 26-310(a). If DEP is correct, the same requirements could be imposed by every other state agency issuing permits.

However, since the inclusion of the CESA provisions in the agency's General Permits, the Appellate Court has clearly given effect to the safe harbor provision in a challenge to a residential subdivision under the Connecticut Environmental Protection Act involving the state endangered timber rattlesnake. In *Animal Rights Front, Inc. v. Jacques*, 88 Conn. App. 358, 364 (2005), the court held that the harm to timber rattlesnakes from the construction of the subdivision in question was not intended by the subdivider, "but rather is incidental to the lawful development of the property."[17] The *Jacques* court further elaborated, "The legislature, under the Connecticut Endangered Species Act, excluded that type of harm from the ambit of the Act."[18] The Appellate Court decision clearly supports the proposition that in a development scenario, to the extent an incidental taking occurs, it is excluded from the ambit of the CESA.

Finally, to the extent there is any ambiguity in the statutory provisions themselves and the referenced case law, the legislative history of CESA makes it clear that private landowners would not be subject to the Act, except for the specifically prohibited active "taking" language in Section 22a-311(a). Both the proceedings on the floor of the House and Senate and the transcript of the Environment Committee Hearing on the bill leave no doubt that development of private property was not subject to the Act.

For example, Representative Mary Mushinsky, in introducing the bill on the floor of the House on May 10, 1989, said:

> It's important to note, Members of the House, that this is principally a state agency bill. It does not affect landowners. Landowners are exempted from the bill if they incidentally take one of these species or if someone takes one of these species from the landowner's property with his written permission. Because it is a state agency bill only, there's only modest protection for the species. Still I would urge your support for this modest step forward. Thank you.

32 H. R. Proc., Pt. 17, 1989 Sess., p. 582532.

Analysis of General Permit for Stormwater from Construction Activities and Water Quality Certification for Corps PGP for Connecticut

Stormwater from Construction Activities General Permit

This General Permit applies to all discharges of stormwater and dewatering wastewater from construction activities (all phases) which result in the disturbance of greater than or equal to one acre of land area on a site.[19] For construction projects with a total disturbed area (regardless of phasing) of greater than five (5) acres, registration is required to be submitted to DEP in order for the discharges to be authorized by this general permit.

It is the projects in the greater than five (5) acre category that typically trigger CESA issues. The registrant is responsible for compliance with all conditions of the general permit, including Section 3(b)(2), which states:

> Such activity must not threaten the continued existence of any species listed pursuant to Section 26-306 of the Connecticut General Statutes as endangered or threatened and must not result in the destruction or adverse modification of habitat designated as essential to such species.

General Permit for Stormwater from Construction Activities, Section 3(b)(2).

The legal predicate for this condition is questionable. As previously discussed, it is not authorized by CESA, nor is it authorized by the Connecticut Clean Water Act, Conn. Gen. Stat. § 22a-430b, which empowers the Commissioner to issue general permits for stormwater and other types of discharges. It exempts people initiating or maintaining discharges covered by a general permit from applying for an individual permit.[20]

The statute requires that the general permit describe the category of discharge being regulated, specify the manner, nature and volume of discharge, require proper operation and maintenance of any pollution abatement facility required by the permit, and be subject to any other requirement or restriction the commissioner deems necessary to fully comply with the purposes of Chapter 446k, the federal Water Pollution Control Act and the federal Safe Drinking Water Act.[21] Nothing in the statute authorizes the DEP to regulate activities that do not relate to the discharge or otherwise affect the waters of the state. In particular, it should be noted that the CESA, which is part of Chapter 495, is not included among the statutes which the Commissioner may consider in imposing "any other requirement or restriction."

Even if condition 3(b)(2) were authorized by the CESA or the Clean Water Act, a

plain reading of these provisions compels the conclusion that the discharge of stormwater and dewatering wastewater from construction activities are the "activities" that must not impact endangered or threatened species or their essential habitats. It also reflects the legal reality that, while the Commissioner may have jurisdiction over stormwater discharges, she does not have jurisdiction over the approval and construction of a subdivision approved by a local planning and zoning commission. Nevertheless, DEP's practice is not to restrict its review to the discharge, but to examine the entire project area and the modifications being made to it for impacts to terrestrial as well as aquatic habitats of state-listed species.

Parties registering for this General Permit should be aware that inadvertent destruction of the habitat of listed species may result in a claim by DEP for significant civil penalties of $25,000 per day as a violation of a state Clean Water Act permit.[22] Although the legal authority for this claim seems doubtful for the same reasons that undermine the validity of the permit condition itself, DEP has taken the position that, even if the condition is of questionable validity, the registrant for the General Permit accepts it when he signs the registration. Therefore, he is bound by it. No reported cases have addressed this question.

Water Quality Certification in Connection with the Corps PGP for Connecticut

The PGP is required for development projects involving discharges of fill to federally regulated wetlands.[23] The PGP is structured into two categories of eligibility: Category 1 and Category 2. Category 1 generally covers projects with direct and secondary impacts to Corps-regulated wetlands of less than 5,000 square feet. These projects are deemed to have "minimal impact" on aquatic resources and do not require notice to the Corps, provided the project has received a permit under the Connecticut Inland Wetlands and Watercourses Act ("IWWA"), Conn. Gen. Stat. § 22a-36 *et seq.* Category 2 requires an application to the Corps and DEP, inter-agency screening, and written authorization from the Corps. Category 2 is limited to projects with direct and secondary impacts to Corps-regulated resources of between 5,000 square feet and one acre.

Pictured above: Eastern Spadefoot Toad

The goal of the PGP is to provide a streamlined alternative to obtaining an individual permit from the Army Corps of Engineers ("Corps") and an individual Water Quality Certification from the DEP for discharges of fill to waters of the United States and adjacent wetlands. In Connecticut, DEP issues the water quality certification for federal permits involving discharges, including Corps permits. The Department has adopted water quality standards, which provide the regulatory yardstick for determining whether a given discharge of fill to a wetland is acceptable. Consistent with the goal of streamlining the permit process, DEP has issued a conditional water quality certification to the Corps for the PGP itself for projects which comply with the conditions of Category 1 or Category 2.

Nonetheless, many activities are excluded from Category 1 coverage, thereby requiring applications for inter-agency screening under Category 2 or individual permits. One of the Category 1 exclusions includes projects with direct or secondary impacts to state endangered, threatened, or special concern species, or significant natural communities, as identified by DEP on maps previously described titled "State and Federal Listed Species and Significant Natural Communities." According to DEP, these exclusions were incorporated in the PGP to ensure that water quality certifications issued under the PGP comply with CESA.

As previously discussed, CESA does not appear to provide any authority for imposing a state endangered species review on a private party. Nor is there authority for this requirement in the federal or state statutes concerning the issuance of water quality certifications or the Connecticut water quality standards themselves.

The Connecticut water quality certification program is a creature of Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, and nothing in Section 401 bears on the issue of state endangered, threatened, or special concern species, or significant natural communities. Under Section 401, the scope of the water quality certification is limited to a determination of whether the proposed discharge complies with the state's water quality standards, or applicable effluent limitations.

The practical effect of the PGP exclusion for projects with direct or secondary impacts on state-listed species and their habitats is the imposition of CESA mitigation as a condition of obtaining the 401 water quality certification necessary for the issuance of Corps approval.

As with the stormwater general permit discussed above, the DEP does not limit its review to impacts from the discharge of dredge or fill material and associated secondary impacts to the aquatic ecosystem.

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Rather, it examines the entire project area, including the uplands, for impacts to essential habitat for state-listed species, and, where impacts are foreseen, requires project modifications or mitigation prior to signing off on a Category 2 approval or issuing an individual water quality certification.

Conclusion

Currently Connecticut's program to protect listed species on private property lacks both transparency and consistency in application owing to an absence of clear legal authority. The lack of transparency serves as a trap for the unwary in the form of project delays or potentially costly enforcement proceedings. The lack of consistency provides only sporadic protection for listed species. The only private projects generally subject to scrutiny are those with five (5) acres or more of construction disturbance requiring a General Permit for Stormwater for Construction Activities, or those with direct discharges of fill to federally regulated wetlands which require a Corps permit and DEP water quality certification. Other private construction projects, unless associated with activities covered by some other DEP General Permit do not generally receive scrutiny by DEP for CESA issues.

The General Permit for Stormwater from Construction Activities expires on September 30, 2007. Its renewal offers stakeholders and DEP management the opportunity to engage these CESA issues now to come to some agreement as the best way to protect listed species without selectively forcing mitigation through approval processes not designed by the legislature to include CESA issues.

Alternatively, there would appear to be at least two other logical approaches to address these issues. First would be a declaratory ruling request made to the Commissioner by a stakeholder or stakeholders to obtain the DEP's definitive position on its authority in this area, with the potential for an appeal to superior court to settle the legal question. Second would be a legislative fix clarifying the General Assembly's present intentions as to the best way to address protection of essential habitat for listed species on private property. Based on the Act's legislative history, this policy debate never took place in 1989. If the issue is to be joined prior to the Department's reissuance of the General Permit for Stormwater for Construction Activities in the fall of 2007, it should be taken up in the upcoming session of the General Assembly. **CL**

Gregory A. Sharp is a partner in the Hartford office of Murtha Cullina LLP, where he practices in the full spectrum of environmental law. Loni S. Gardner is an associate in the Hartford office of Murtha Cullina LLP, where she practices in the areas of environmental law, litigation, and construction law.

Notes

1. Conn. Gen. Stat. § 26-303 *et. seq.*
2. *See* Conn. Gen. Stat. § 26-310; *see also* remarks of Representative Mary Mushinsky, *infra*, 32 H.R. Proc., Pt. 17, 1989 Sess., p. 582532; *see also* DEP website at http://www.dep.state.ct.us/cgnhs/nddb/info.htm (stating the purpose of CESA "is to conserve, protect, restore and enhance any endangered or threatened species. The Act requires that any action authorized, funded or performed by state agencies can not threaten the continued existence of any State Endangered or State Threatened species.").
3. On May 31, 2006, the Corps reissued the PGP for the next five years with similar conditions.
4. Permits are required to collect individual specimens of wildlife species. *See* Conn. Gen. Stat. § 26-60. In addition, the landowner's permission is required to collect specimens of any listed species. Conn. Gen. Stat. § 26-311(a)(1) & (2).
5. Section 401 of the Federal Clean Water Act, 33 U.S.C. § 1341.
6. *See* Conn. Gen. Stat. § 26-305.
7. *See* Endangered Species Act, 16 U.S.C. § 1531 *et. seq.*
8. *See* Conn. Gen. Stat. § 26-306.
9. *See* Conn. Gen. Stat. § 26307.
10. *See* Conn. Gen. Stat. § 26-304(7).
11. Conn. Gen. Stat. § 26-304(8).
12. Conn. Gen. Stat. § 26-304(9).
13. Conn. Agencies Regs. § 26-306-1 *et seq.*
14. The DEP does maintain a Natural Diversity Data Base ("NDDB") and provides screening tools to applicants to make preliminary judgments about the existence of state and federal listed species on property of interest. First is the publication of maps of "State and Federal Listed Species and Significant Natural Communities." Each town has a map on which shaded areas indicate the likely presence of listed species based on anecdated reports, and the maps are also available on DEP's website. The maps are not species specific, so if a potential conflict is found, the applicant must submit a written request for a site specific NDDB review. The DEP will typically provide a written response within several weeks noting the listed species likely to be present. As helpful as these screening tools are, they suffer from producing both false negatives and false positives. From an applicant's perspective, the false negative presents a problem when review of the NDDB map produces no conflict, but during project permitting a listed species is discovered on-site, causing a permitting delay until the issue can be resolved. From a species protection perspective, a false negative that goes undetected can result in destruction of essential habitat during project construction. The false positive is problematic, because it requires a field survey that proves to be fruitless. Because each species is unique, to be accurate, surveys must be conducted during the time of year that is appropriate for each of the species which might reasonably be present. When multiple species are involved, the logistical problems of performing these surveys can prove to be daunting.
15. Conn. Gen. Stat. § 22a-1a through 1h.
16. *See* Conn. Gen. Stat. § 26-310(a).
17. *See Animal Rights Front, Inc. v. Jacques*, 88 Conn. App. 358, 364 (2005)
18. *See id.*
19. *See* General Permit for the Discharge of Stormwater and Dewatering Activities Associated with Construction Activities, Section 3(a) (defining eligible activities).
20. Conn. Gen. Stat. § 22a-430b(a).
21. Conn. Gen. Stat. § 22a-430b(b).
22. Conn. Gen. Stat. § 22a-438.
23. For a more detailed overview of the PGP, see Gregory A. Sharp & Aimee L. Hoben, *The New Connecticut PGP Applicable to Inland and Coastal Waters and Wetlands*, Connecticut Lawyer, October 2006, Vol.17, No. 2, at 12-16.