

NOT SO FAST, CONNECTICUT DEEP!

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On July 28, 2015, the Connecticut Supreme Court released its unanimous decision in *Tilcon Connecticut, Inc. v. Commissioner of Environmental Protection*. This important decision is of potential significance for all applicants for Connecticut Department of Energy and Environmental Protection (DEEP) permits. **In *Tilcon*, the Supreme Court concludes that the DEEP exceeded its authority when it imposed burdensome and costly information demands on Tilcon**, an applicant for multiple water diversion permits under the Connecticut Water Diversion Act.

HBRA CT is one of three organizations who filed an *amicus* brief in the *Tilcon* matter, urging, on behalf of HBRA CT members who are frequent applicants for DEEP permits, that the Court find that the DEEP was overreaching when it insisted that Tilcon provide expansive additional information before the DEEP would take action on Tilcon's water diversion permit applications.

In 2003, Tilcon applied to the DEEP for water diversion permits for discrete water diversions, specifically withdrawals of water from wells and withdrawals of water from manmade surface basins in Plainfield, Wallingford, Montville, Griswold, and North Branford. Previously, Tilcon had applied for, and obtained, federal, state and local permits pertaining to its earth materials excavation and processing operations, including local wetlands permits. Before processing the water diversion applications, the DEEP wanted to see and review comprehensive information about Tilcon's current and contemplated earth excavation and processing activities over the next twenty-five years. The DEEP asked for a site-wide plan showing, among other things, all inland wetlands and watercourses and the habitats of all endangered, threatened and special species. The DEEP's basis for insisting on the submittal of this comprehensive information was its claimed jurisdiction and authority over all of the applicant's activities at each of the properties. The DEEP maintained that the information was required so the DEEP could "cohesively manage and protect our natural resources."

Of particular concern to HBRA CT members, for one of Tilcon's locations, the DEEP requested a wetlands mitigation plan to "offset" impacts due to activities taken pursuant to local wetlands permits that had been issued to Tilcon in 1974 and 1984. The DEEP asserted that its jurisdiction overlaps with that of the local wetlands agency and that the DEEP had "separate and broad authority" when it came to wetlands impacts. Also, until Tilcon's compliance with its information requests, the DEEP refused to issue a long-awaited water discharge permit to Tilcon, claiming that the two water permits – one for a discharge and the other for a diversion – were related.

In overruling the lower court and the DEEP, the Supreme Court noted that, while the water diversion activities did enable the applicant to engage in its excavation activities, the water that was being diverted was not used directly to excavate earth at its locations. Accordingly, **the Court concluded, the Water Diversion Act did not authorize the DEEP to regulate the applicant's business operations "separate and apart from" the water withdrawals that**

were the subject of the water diversion permit applications. The Supreme Court rejected the DEEP's position that it could require a wetlands mitigation plan to address impacts of activities that had been permitted many years before by the local wetlands agency. Finally, the Supreme Court held that the DEEP was not authorized to delay issuance of a decision on the applicant's water discharge permit renewal application, simply because the water diversion permitting process was on-going.

Even where a permitting statute includes language like that in the Water Diversion Act authorizing the DEEP to require a permit applicant to provide whatever information the DEEP "deems necessary to fulfill the purposes of" the Water Diversion Act, this authority has limits. The DEEP can request information about diversions in addition to the diversion for which the applicant is seeking a permit, but only if this information "is necessary for sufficient review" of the diversion that is the subject of the application. There needs to be a "hydraulic relationship" between the diversion to be permitted and other diversions at the applicant's property. Absent this relationship, the Supreme Court observes that the scope of what's being permitted cannot be, in effect, expanded by the DEEP's request for information. The Supreme Court further holds that, unless there is a link between the diversion that is the subject of the permit application and specific wetlands impacts, the DEEP lacks authority to request a wetlands mitigation plan to otherwise address, or in response to, locally permitted wetlands impacts. And, per the Supreme Court, while the DEEP might delay action on a water discharge permit application if there were other water discharge applications pending, the DEEP cannot delay action on an application for a different type of permit because there is a water diversion permit application pending.

The Supreme Court's decision is tied to the specific facts pertaining to Tilcon and its water diversion permit applications, but the message to the DEEP is clear. This message is that the **DEEP's authority to require studies and other information from a permit applicant has limits**. Also, as part of this message, the **DEEP is on notice that, without a requisite connection, the DEEP cannot use one permit program to revisit permits previously issued in another**, such as a local wetland permit authorizing wetlands impacts. In addition, a pending application under one DEEP permit program cannot trump a DEEP decision on an application for a permit under another DEEP permit program.

The Supreme Court's decision in *Tilcon* will likely be cited forcefully and often when an applicant for a DEEP permit feels the DEEP is overstepping the boundaries of its authority to require additional information before taking action on a pending permit application.