



STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION



***** *
IN THE MATTER OF A PETITION FOR A *
DECLARATORY RULING BY *
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*
TILCON CONNECTICUT, INC. *
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DECLARATORY RULING

As the Commissioner of Environmental Protection, I am issuing this Declaratory Ruling under the authority provided by Conn. Gen. Stat. §4-176 and Regs., Conn. State Agencies §22a-3a-4(c)(3) in response to a petition for a declaratory ruling submitted by Tilcon Connecticut, Inc. (Petitioner/Tilcon). Tilcon submitted the petition to the Department of Environmental Protection (DEP/the Department) on September 2, 2009 and I expressed my intent to issue this Ruling on November 2, 2009. The petition presented these three questions for my consideration:

- 1. When processing an application for a water diversion permit, does the DEP have jurisdiction and authority to consider all potential environmental resources and issues on the entire site on which the diversion is located, even if those other resources and issues are hydraulically unrelated to the diversion or are committed by statute or regulation to other DEP bureaus or regulatory agencies?
2. When an applicant for a water diversion permit already has obtained a local wetlands permit for activities that are located on the diversion site but are hydraulically unrelated to the diversion, may the DEP, processing a diversion permit application, demand information regarding such wetlands and regulated activities and regulate those activities again?
3. May the DEP decline to process or delay processing an NPDES permit renewal on the ground that the applicant has not supplied to the DEP requested additional information regarding a pending water diversion permit application?"

I
THE RECORD

The DEP and the Petitioner (collectively the “Parties”) filed stipulated facts with twenty five exhibits (SE-1 through SE-25) on December 31, 2009. (see attached list.) Pursuant to a scheduling order that I issued on December 30, 2009, the Petitioner submitted a brief on January 21, 2010 (Pet. Br.) and a reply brief on February 5, 2010 (Pet. Rep. Br.). DEP submitted its brief on January 22, 2010 (DEP Br.) and its reply brief on February 5, 2010 (DEP Rep. Br.) These briefs were accompanied by affidavits and additional exhibits for my consideration.

In addition to the materials submitted by the Petitioner and DEP staff, I also invited the public to provide written comments on the petition. I received three written comments. One comment from Connecticut Fund for the Environment supported DEP’s position as properly within the scope of its authority under the Connecticut Water Diversion Policy Act (the Diversion Act or the Act) and its regulations. The other two comments, from the Connecticut Water Works Association and Haynes Materials, Inc., agree with the Petitioner that it is beyond DEP’s authority to ask for this information.

II
FINDINGS OF FACT

A. Tilcon owns five facilities in Plainfield, Wallingford, Montville, Griswold, and North Branford that are involved to varying degrees in the extraction and processing of earth materials. In June 2003, Tilcon submitted individual applications to the DEP Inland Water Resources Division (IWRD) for water diversion permits. (Exs. SE-1 through 5.) On July 18, 2006, the IWRD responded to these applications with a request for additional information from Tilcon regarding overall site characteristics and a resources inventory to facilitate the evaluation of impacts to wetlands and water resources required by the Diversion Act. (Ex. SE-6.) Tilcon’s response in March 2007 expressed its legal opinion that the DEP was not entitled to that information because Tilcon’s earlier applications confirmed the limited impact of its proposed withdrawals. (Ex. SE-8.) Tilcon submitted supplemental application information limited by its interpretation of the scope of DEP’s right to request site information. (Ex. SE-9 through 13.) Numerous attempts were made to reach a compromise, including an offer from DEP for a shorter

permit term in exchange for information on portions of the sites. (Ex. SE-17.) On October 21, 2008, IWRD, by letter, reiterated the basis for its request for this information (Ex. SE-17). After receipt of that letter, Tilcon did not present the information requested and filed its initial request for a Declaratory Ruling. (Ex. SE-18.)

B. The Petitioner originally filed a petition for a declaratory ruling on these issues on January 16, 2009. (Ex. SE-18.) Following former Commissioner McCarthy's March 13, 2009 communication regarding the adequacy of notice of that original petition, the Petitioner published notice of the petition in newspapers throughout the state on April 23, 2009 and provided an affidavit attesting to the additional notice on May 13, 2009. (Exs. SE-19 and 20.) On July 6, 2009, I accepted that petition and issued a Notice of Intent to Issue a Declaratory Ruling. (Ex. SE-21.) Through this office's inadvertent error, the Petitioner was not notified of the publication of that notice until August 5, 2009. In an effort to be accountable for the mistake, DEP offered to accommodate any of the Petitioner's concerns resulting from the delay in notification. The Petitioner declined this offer and instead withdrew its original petition on August 19, 2009. (Ex. SE-22.) It re-filed its petition on September 2, 2009. (Exs. SE-23.) I accepted the re-filed petition and formally stated my intent to issue this Ruling on November 2, 2009. (Ex. SE-24.) The Petitioner published notice of the petition in accordance with statutory requirements. (Ex. DEP-25.)

C. The Petitioner uses water at all its facilities from man-made basins. These basins provide water for quarry operations, including aggregate washing, equipment cooling, and dust suppression. The source of water for these basins is stormwater and, to some extent, groundwater seepage. The water pumped from these basins is used at various locations around the sites. It is not used directly for excavation or extraction. The water withdrawal is necessary for the continued operation of the facilities. The basins are located at lower elevations on each site to enable the manipulation and collection of stormwater for each facility's needs. (Exs. SE-1 through 5)

D. On October 21, 2008, the DEP requested information it deemed necessary to find the Petitioner's application complete. In this request DEP sought:

1. For the existing limits of the processing and excavation areas and any areas proposed to be disturbed for the duration of the permit, site plans with:
 - Delineated boundaries of inland wetlands and watercourses;
 - The location of the FEMA floodplain and floodway and the elevation contour of the base flood;
 - Existing topography and proposed topography in any areas of expansion;
 - Location and extent of buffer areas to protect inland wetlands and watercourses;
 - An erosion and sedimentation control plan; and
 - Adequate stormwater control measures.
2. A hydraulic and hydrologic report that demonstrates that:
 - hydraulic aspects of the project sites have been properly designed within accepted criteria, provided for in the statutes, regulations, and engineering practice;
 - project sites, specifically the North Branford and Wallingford quarries, do not impede or modify drainage patterns, flood flows, flood storage, or low flows in such a way as to cause adverse impacts to other properties or to the environment; and
 - the project sites are constructed in such a way as to protect other properties and the environment from adverse pollution impacts.
3. If any expansion of the existing processing and/or excavation areas, proposed for the duration of the permit, will encroach into the delineated inland wetlands and watercourses, the following reports will be required:
 - aquatic and vegetation habitat surveys and assessments of the inland wetlands and watercourses to be impacted;
 - functions and values assessment of the inland wetlands and watercourses to be impacted;
 - an assessment of the impacts to the functions and values of the affected inland wetland and watercourses; and
 - an inland wetland and watercourses mitigation plan which proposes measures to offset assessed impacts.

4. For the Griswold site, in current and proposed excavation areas, information related to the presence of the wood turtle and eastern box turtle, and if present, plans to minimize and mitigate for any impact.
5. For the North Branford Site: a mitigation plan for impacts to 12 acres of wetlands; a channel and crossing improvement plan which provides safe conveyance for the proposed 2 million gallons per day discharge and a 25-year storm flow from the quarry outlet downstream to Cedar Lake; and a plan to treat the quarry to be consistent with the Environmental Protection Agency (EPA) approved total maximum daily load for phosphorus, which limits the discharge to Cedar Lake and Linsley Pond to 28 kg/year or 2.33 kg/month.

III *LEGAL ANALYSIS*

Question 1

Question 1 applies to all five facilities for which Tilcon has submitted applications and asks “[w]hen processing an application for a water diversion permit, does the DEP have jurisdiction and authority to consider all potential environmental resources and issues on the entire site on which the diversion is located, even if those other resources and issues are hydraulically unrelated to the diversion or are committed by statute or regulation to other DEP bureaus or regulatory agencies?”

In its brief, the Petitioner urges me to pay close attention to the wording of this question and cautions that any general ruling on DEP’s authority to request information without answering the petition’s specific question will be a waste of time. (Pet. Br. 3, 19.) This insistence is based on the fact that, in the Notice of Intent issued on November 2, 2009, I gave a general description of the question in addition to stating the question verbatim and urging the public to review the petition in its entirety. The Petitioner views my action as an improper attempt to “put [my] thumb on the scale with regard to the merits” or to somehow avoid the question. (Pet. Br. 19.) The general description of the question that I provided represents my attempt to offer someone without specific knowledge of the applications a conceptual view of the question. This would enable the public to understand that the application of this ruling may

extend beyond the five facilities listed in the petition. I fully understand the need to issue a ruling on the question based on the specific factual circumstances.

I agree with the Petitioner that this declaratory ruling must “address the specific, fact based question posed by this petition” or it will be a waste of time. (Pet. Br. 19.) However, question one lacks sufficient context to provide an answer applicable to the Petitioner’s factual situation because, as written, question one does not reflect the facts in the record. Any answer to question one in isolation would only provide an answer with general applicability, a result the Petitioner cautions against. (Pet. Br. 19.) The DEP did not request information on “all potential environmental resources and issues on the entire site on which the diversion is located” as the Petitioner asserts in question one. (Ex. SE-23, emphasis added.) The October 21, 2008 letter from DEP requests information related to inland wetland resources, water quality, flood management, wildlife, and the scope of the diversion.

As the Petitioner notes in its brief, a declaratory ruling petition must be based on “the applicability to specified circumstances of a provision of the general statutes.” CGS §4-176. The specific factual circumstances that serve as the basis for this petition involve DEP’s actual request for additional information, which prompted Tilcon to file its petition. (Pet. Br. 6.) Therefore, I will use this October 21, 2008 request to properly frame the question and articulate the scope of the Department’s authority under the Diversion Act and its regulations to seek this information given the set of circumstances surrounding Tilcon’s applications.

Conclusions

The Connecticut Water Diversion Policy Act provides broad authority to the DEP for the protection of Connecticut’s water resources and the uses they support.

The Diversion Act was passed “in recognition that the waters of Connecticut are a precious, finite and invaluable resource ... and in further recognition that an adequate supply of water for domestic, agricultural, industrial and recreational use and for fish and wildlife is essential to the health, safety and welfare of the people of Connecticut... .” CGS §22a-366. Although the Diversion Act grew out of controversies regarding the withdrawal of drinking

water from the Farmington and Connecticut Rivers, what was passed is clearly a far reaching statute intended to protect the state's water resources from unfettered use or alteration.

To fulfill this purpose, the legislature broadly defined the term "diversion" to mean "any activity which causes, allows or results in the withdrawal from or the alteration, modification or diminution of the instantaneous flow of the waters of the state" and the term "waters" to include "all tidal waters, harbors, estuaries, rivers, brooks, watercourses, waterways, wells, springs, lakes, ponds, marshes, drainage systems and all other surface or underground streams, bodies or accumulations of water, natural or artificial, public or private, which are contained within, flow through or border upon this state or any portion thereof." Connecticut General Statutes (CGS) §22a-367(2) and (9). The legislature also required an applicant for a diversion permit to submit "such information that the Commissioner deems necessary to fulfill the purposes of sections 22a-365 to 22a-378", which includes but is not limited to "[a] description of the existing water system where the diversion is proposed" and information on "the effect of the proposed diversion on public water supplies, water quality, wastewater treatment needs, flood management, water-based recreation, wetland habitats, waste assimilation, agriculture, fish and wildlife and low flow requirements..." CGS §22a-369. Section 22a-373(b) requires that the Department use this information to consider, among other factors: "[t]he effect of the proposed diversion on existing and planned water uses in the area affected such as public water supplies, relative density of private wells, hydropower, flood management, water-based recreation, wetland habitats, waste assimilation and agriculture; [c]ompatibility of the proposed diversion with the policies and programs of the state of Connecticut, as adopted or amended, dealing with long-range planning, management, allocation and use of the water resources of the state;" and "[t]he effect of the proposed diversion on the existing water conditions, with due regard to watershed characterization, groundwater availability potential, evapotranspiration conditions and water quality."

As the Petitioner recognizes in its brief, this is a broad grant of authority to request and consider information concerning a proposed diversion and its impacts. (Pet. Br. 2.) The broad authority this statute provides to the DEP to request and consider site resource information is not

without limits but is certainly not as limited as the Petitioner urges. According to the Petitioner, the Department is not legally entitled to the scope of information it requested because the information relates to site features that are not impacted by the withdrawal of water from the on-site basins at its facilities. The Petitioner uses the term “area of influence” to describe this concept. This term, absent from the Diversion Act and its regulations, is used by the Petitioner to describe how it calculated the effect of the diversion in a manner that, in its opinion, is contemplated by the statute. The Petitioner contends that the effect of the diversion in this case is measured by calculating the area of influence of the withdrawal from the basins.

DEP staff may or may not agree with the Petitioner’s calculations as they apply to the withdrawal of water from the basins. However, this ruling will not decide whether the Petitioner’s calculations of this effect are accurate or scientifically sound. Instead, it must focus on whether DEP staff’s request is consistent with the authority granted by the Diversion Act and its implementing regulations.

Upon applying the law to the specific circumstances at issue here, I find that staff’s request for information was consistent with and did not exceed its statutory authority. The Diversion Act expressly requires DEP to evaluate the impact of a diversion on wetlands habitats, water quality, and flood management. To conduct this analysis, staff must start with an understanding of the resources *potentially* affected by a proposed diversion before it can draw conclusions about the activity’s impact or “effect” on those resources. DEP can then review an applicant’s submissions regarding the hydraulic or hydrologic connections between the proposed diversions and the on-site resources. This approach allows the agency to confirm for itself the effect of the proposed diversion. DEP’s request for the Petitioner to inventory site resources and provide detailed site information on changes to topography that could alter natural drainage at the Petitioner’s facilities is a necessary part of this analysis and is authorized on its face by the Diversion Act and its regulations.

DEP's request for information is not focused solely on the withdrawals from the Petitioner's on-site basins because these withdrawals may not represent the full extent of the water diversion activities on-site.

Tilcon bases its arguments against providing the requested information on its faulty assumptions that DEP is requesting information on all of Tilcon's site activities and that its sole basis for this request is that the activities occur on the same site as the basins from which Tilcon withdraws its water. These assumptions are incorrect because the October 21, 2008 request does not ask for information on *all* activity and was not based solely on the withdrawals from the on-site basins. As stated in the letter, DEP requests information related to wetlands, flood management, and water quality and this request is authorized because Tilcon's mining activity "will result in the withdrawal from the instantaneous flow of the waters of the state." This "activity" includes but is not limited to the withdrawal of water from on-site basins.

In its permit applications and supplemental materials, Tilcon has unilaterally chosen to limit the scope of its diversion to the withdrawal from the on-site basins and failed to acknowledge other site activities that meet the definition of diversion. In its brief, Tilcon demonstrates its complete misunderstanding of the applicability of the statute to its activities. Tilcon states that only withdrawals exceeding 50,000 gallons per day (gpd) require a diversion permit. (Pet. Br. 22.) This directly contradicts §22a-377(c)-1 of the Regulation of Connecticut State Agencies (RCSA). This section explains the types of activity regulated by the Diversion Act. Of note, the list includes, in addition to the withdrawal of 50,000 gpd, "collection and discharge of runoff, including stormwater drainage or skimming flood flows, from a watershed area 100 acres or greater, and "relocation, retention, detention, bypass, channelization, piping, culverting, ditching or damming of waters where the drainage area tributary to such waters is 100 acres or greater."

Tilcon insists that the DEP letters dated July 18, 2006 and October 21, 2008 request additional site information only because its diversion, limited in its opinion to the withdrawal from the basins, "facilitates" the ongoing mining activities. However, in its final request for this information, DEP clarifies that it has jurisdiction because "the site activity, which *includes* the withdrawal of water from on-site basins, will result in the withdrawal from the instantaneous

flow of the waters of the state.” (Ex. SE-17, Emphasis added.) It is clear that Tilcon’s need for a diversion permit may extend beyond the proposed withdrawal from the basins because its mining activities can alter or modify the instantaneous flow of the waters of the state.

The Petitioner claims that it first became aware of DEP’s opinion that Tilcon’s mining activities represent a diversion when it read DEP’s brief and its attachments. (Pet. Rep. Br. 5.) DEP did not hide this statement summarizing its jurisdiction over site activities in the depths of the October 21 letter. It is set out in a separate paragraph summarizing DEP’s position on its rights to this information, as Tilcon notes in its brief. (Pet. Br. 21.) Tilcon ignores the fact that mining activities can be a diversion and continues its attempt to limit the scope of this review to its withdrawal from the basins.

In its reply brief, Tilcon asserts that this issue is outside the scope of this declaratory ruling because it is beyond its original understanding of DEP’s October 21, 2008 request and therefore not the focus of its petition. At the same time Tilcon demands that I focus on the facts of its situation, it also requests that I ignore them.¹ Tilcon cannot deny the fact that its mining activities themselves are by definition a diversion that may be subject to permitting requirements. As stated earlier in this Ruling, the regulatory language provides that the “collection and discharge of runoff, including stormwater drainage or skimming flood flows, from a watershed area 100 acres or greater” and the “relocation, retention, detention, bypass, channelization, piping, culverting, ditching or damming of waters where the drainage area tributary to such waters is 100 acres or greater” are all subject to regulation under the Diversion Act.

Tilcon attempts to argue that these regulatory standards are inapplicable to its activities, but the premise of this argument is elusive. (Pet. Rep. Br. 5.) For instance, Tilcon appears to argue that its use of the on-site basins to collect water is not subject to regulation because their surface area is less than 100 acres. This is incorrect. The area that needs to be calculated is the area that drains *to* these basins. Even if no water is consumed, the act of collecting water or

¹ While Tilcon repeatedly expressed that this Ruling would be a waste of time if it did not focus on the specific factual circumstances of this matter, I cannot limit my focus solely to Tilcon’s version of those circumstances.

otherwise modifying its flow from a drainage area over 100 acres requires a water diversion permit. RCSA § 22a-377(c)-1.

The interconnectedness of water, especially water flowing along natural drainage patterns, cannot be ignored. The requested information on topography and the extent of future excavations is critical to understanding current and future drainage patterns. Furthermore, the impact of changing these patterns can only be determined by a thorough analysis of wetland resources in the area, including wildlife dependent on those resources. DEP's review must start with this information to determine the activities subject to permitting requirements and areas actually affected by these diversions. Tilcon's refusal to supply this information stands in the way of this first level of analysis.

The effect of the petitioner's basins is not limited to the "area of influence" calculated by the petitioner.

Even if Tilcon's diversion of water was limited solely to the basins, the DEP is still entitled to comprehensive site information. Although water withdrawn from these basins is not used in the actual mining process, it is used for the processing and sale of the product. The Petitioner argues that any connection DEP makes between the water pumped from the basins to Tilcon's mining activities requires DEP to make an "unfounded leap." The connection between the basin diversions and other site activity is not so tenuous. In fact, the Petitioner itself has stated in its application materials that the diversion from the basins is necessary for the continued operation of the site. (exs. SE-1 through 5.) The water's use in preparing materials for sale enables Tilcon to remove more earth materials arguably impacting more resources and further altering the flow of water into and around the site and into the basins. If no more water is withdrawn, Tilcon arguably cannot process and sell more product and will not alter the landscape further. This connection requires the DEP to seek additional site information to understand the effect of the proposed diversion on resources as contemplated by the Diversion Act.

The Petitioner argues that the words "effect of the proposed diversion" used throughout the Diversion Act limit the areas to be considered and therefore the information DEP is allowed

to collect to what is hydraulically affected by the diversion. This limitation on the word “effect” is not apparent from the text of the Diversion Act. If the legislature intended such a limitation then it could have clearly placed it in the act. One “cannot, by construction, read into statutes provisions which are not clearly stated.” (internal citations omitted) *Glastonbury Co. v. Gillies*, 209 Conn. 175, 179-80 (1988). The legislature proved itself perfectly capable of placing limits on the application of this statute by providing permitting exemptions for certain activities and authorizing DEP to promulgate additional exemptions in regulations. CGS §22a-377. The intent to protect the public’s interest in its water resources requires a liberal construction of DEP’s authority. “Environmental statutes are remedial in nature and should be construed liberally to accomplish their purposes.” *McManus v. Commissioner of Env. Protection*, 229 Conn. 654, 663 (1994). The absence of any limitation on the word “effect” supports a liberal construction of DEP’s authority to further the purposes of the Diversion Act.

In interpreting this language, the first step is to examine the plain meaning of the language and its relationship with other statutes. If the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. CGS §1-2z. The word “effect” is defined as “[s]omething brought about by a cause or agent, a result.” American Heritage Dictionary 2nd Ed. As a result of the diversion from the basins, Tilcon will remove additional materials and process them for sale. Tilcon does not deny that it plans to continue extracting materials from these sites and has acknowledged that the use of this water is required for continued operation of the site. Therefore, the effect of the diversion includes on-site mining activities that are furthered by the diverted water.

This interpretation does not produce absurd or unworkable results. It recognizes that DEP is authorized to shape the scope of information provided as part of the application process. I agree with the Petitioner that the requirement to submit “such information as the Commissioner deems necessary” does not authorize the DEP to seek any information it wants. It has to be within the scope of the Diversion Act and its purpose of protecting the state’s water resources. It is reasonable to have the applicant submit the type of site information requested so DEP can

evaluate whether there is impact from the diversion on area resources. Logically, DEP requires the applicant to submit information on the site's resources first to foster the evaluation of any impact to these resources. In fact the Petitioner never argues that the *type* of information sought is beyond DEP's authority. Instead it consistently focuses on the *scope* of the information and that it implicates the entire site. In its briefs, the Petitioner is stuck on its position that it has already determined this impact and this determination limits the scope of information DEP can request. This approach does not mesh with the application and review process laid out in the statute. It is DEP's role and not the applicant's to determine the overall impact of the diversion.

The petitioner attempts to demonstrate that DEP's interpretation produces absurd or unworkable results by referencing scenarios not supported by the record. This includes references in its briefs to requests for air pollution information. (Pet. Br. 19) I cannot address hypothetical concerns and must address the specified set of circumstances in this ruling. CGS § 4-176. A review of DEP's actual request for information reveals no such request for air pollution information. The Petitioner's unfounded fears are not evidence of DEP's actual application of its authority over the Petitioner's permit applications.

Tilcon's limited view of the impacts from its basins also ignores the fact that the collection of water is subject to regulation under the Diversion Act in the same way as the physical extraction of water via pumping. RCSA §§ 22a-377(c)-1(a)(2) and (3). The fact that water flows over land into these basins and collects there rather than somewhere else has a potential hydraulic effect on the watershed tributary to these basins and the resources within that watershed. These basins not only collect large amounts of water that could support other resources but also keep this water out of the way of quarry operations, further evidence of the connection these basins have with actual mining operations.² The petitioner's applications themselves provide cause for DEP's concern that site activities beyond the pumping from the basins constitute diversions. For example, when detailing the limited impact of pumping on

² The permit applications reference areas being mined below the elevation of the basins that fill with water that must be separately pumped off-site or up to the basins and internal quarry roads inundated with water during times of high flow.

groundwater at its Wauregan plant, the petitioner states “[i]t should also be noted that Basins 4 and 5 have significant drainage areas and, therefore, even under drought conditions, large quantities of water would be anticipated to drain into these basins.” The basins store “43 million gallons of water” and have “large drainage areas.” (Ex. SE-1, Attachment H.) Likewise, in describing its North Branford operation, the petitioner provides that “[d]ue to the surficial geology of the site, which is mapped as artificial till, till, and bedrock, the majority, if not all, of the water *manipulated* at the North Branford site may be characterized as stormwater.” (Ex. SE-4, Attachment B, emphasis added.)

Therefore, it is proper for DEP to request this information to understand the effect of using water from the basins and collecting water in them. This effect includes mining activities enabled by the collection and use of this water. To not request this information would ignore the interconnectedness of water and DEP’s duties under the Diversion Act to protect the waters of the state from unfettered use. The effect of the diversion may be extensive if it furthers additional alteration in and adjacent to resource areas and collects waters that naturally would supply and support other resources. Without the site information it requested, DEP cannot readily and completely assess these impacts.

In responding to the notion that the collection of water is also a diversion, the Petitioner again attempts to discuss the potential irrational results such an interpretation might have. It argues that this interpretation would require any excavation at a construction site to have a diversion permit. (Pet. Rep. Br. 6.) Although such a hypothetical concern is not reflective of the Petitioner’s circumstances, it is easily addressed. First, the Diversion Act and the regulations exempt certain activities from permitting requirements, including excavations for foundations. RCSA §22a-377(b)-1. Second, there is a general permit program that allows applicants to register activities that will not have extensive impact on natural resources. CGS §22a-378a. Tilcon’s facility is far more complex and the potential impact from a 20-acre collection basin is certainly more significant than the impact from a 1500 square-foot foundation excavation. DEP understands that the Petitioner’s facilities present unique challenges due to their size alone. In recognition of this issue, DEP has offered to allow Tilcon to produce a subset of the requested

information in exchange for a shorter permit period. (Ex. SE-17.) DEP is willing to adjust the extent of information it needs but is not required to withdraw its request for the information because Tilcon objects to providing information beyond the area of influence identified by Tilcon as the applicant.

The Connecticut Supreme Court recently decided in favor of environmental agencies seeking overall site information authorized by statute and regulations.

Ultimately, Tilcon has refused to produce this information because *it* has already determined the scope of the diversion, the resources affected by the diversion, and the effect of the diversion on those resources. Therefore, it argues DEP is not entitled to request further information because doing so would go beyond the limits of DEP's authority under the Diversion Act. This interpretation is contrary to the recent decision by the Connecticut Supreme Court (Court) in *Unistar Properties LLC v. Conservation and Inland Wetlands Commission of the Town of Putnam et al.* 293 Conn. 93 (2009). The *Unistar* decision supports DEP's authority to seek information on the site's resources as DEP deems necessary to understand and independently review the proposed activity and determine if a particular site's resources are impacted.

In *Unistar*, the defendant, the Conservation and Inland Wetlands Commission of the Town of Putnam (Commission), denied the plaintiff's application for a permit under the Inland Wetland and Watercourses Act (IWWA) as incomplete. The plaintiff failed to provide the Commission with certain information, including a sufficiently detailed wildlife inventory and analysis of the alternatives to the proposed activity. The plaintiff appealed, arguing that because its application had established that the proposed activity would not result in a change to the physical characteristics of the wetlands and there was no evidence in the hearing record indicating that an impact to animal species could affect the on-site wetlands, the Commission had no authority to seek the requested information. *Id.* at 99. In examining the statutory scheme, the Court found no such limitation on the authority of the Commission to independently request the information at issue. The Court held that the Commission's actions were appropriate, and, more specifically, that the Commission could seek the resource information it requested to

understand whether the proposed activity would have an impact on wildlife and subsequently on the wetlands.

The Court in *Unistar* reasoned that the plaintiff's arguments: incorrectly assumed that a causal connection between wildlife and wetland characteristics must precede a wildlife inventory; represented an improper attempt to shift the burden of providing information from the applicant to the Commission; and improperly placed the Commission in the role of disproving the plaintiff's assertions rather than evaluating information presented to it in accordance with the statutory scheme. The Court recognized that the Commission would use the wildlife inventory to determine *whether* there are any impacts on wildlife and *whether* any such impact will change the characteristics of the wetland. *Id.* at 112. It agreed that the plaintiff could not "usurp the function of the commission by refusing to provide information that the commission needs in order to evaluate its application simply because the *plaintiff* has determined that no adverse impact will result." *Id.* at 104.

The information DEP requested in the October 21 letter is contemplated by the plain text of the Diversion Act and its regulations. The Petitioner argues that the DEP is legally not entitled to this information because it goes beyond the effect of the diversion as calculated by Tilcon and therefore beyond the extent of DEP's authority under the Diversion Act. Tilcon consistently states in its petition and in its briefs that its determinations on the area of influence are "undisputed", inviting DEP to either disprove these conclusions or accept them without additional information. This is the same argument that failed the developer in *Unistar*.

The Court in *Unistar* ruled that a government entity granted the authority to independently request information in its review and to independently make decisions based on this information is not bound by determinations made by the applicant. I am not persuaded by the Petitioner's attempt to distinguish its situation from *Unistar* by arguing that the scope of DEP's information request is not contemplated by the statute. It is plainly within the Department's jurisdiction to request information that will allow the Department to understand the full extent of the diversion and the resources affected. All of the information requested in the circumstances here falls within the categories of information articulated in the statute and the

regulations. DEP is not only seeking this information to determine the impact of the water collected in and withdrawn from the basins but also to determine if overall site activities are regulated and subject to permitting requirements under the broad definition of “diversion” in the Diversion Act. As DEP notes in its briefs, the Petitioner never makes an argument against the *type* of information DEP sought. Instead, its argument is based on the *scope* of information. This request for baseline site information concerning wetlands, water quality, floodplains, and wildlife is clearly within the scope of the DEP’s authority under the Diversion Act. The request is extensive because the applications seek permits for large-scale sites subject to ongoing alteration for the maximum time period of twenty five years.

As noted by the Petitioner, the *Unistar* decision, in *dicta*, recognizes that it could be arbitrary and capricious for a local wetlands commission to demand information outside a regulated area where “the distance between the regulated area and the areas on the property for which an inventory is requested is so remote and makes it so unlikely that the activity could have any effect on the wetlands... .” *Id.* at 112, footnote 15. This statement does not refute the applicability of the *Unistar* holding to the circumstances here. As described above, the type of information requested by DEP is directly authorized by the Act and the scope of the information is directly related to the diversion activities on-site and the resources potentially affected by those activities. Furthermore, the Court in *Unistar* clearly did not consider a request for resource information on the entire site in question as too remote. Even though the record was not clear about the extent of the Commission’s request for a wildlife inventory, the Court, for purposes of its decision, assumed the applicant’s claim pertained to the Commission’s request for a wildlife inventory for the *entire site*, not just the wetlands on the property. *Id.* at 105, footnote 10. Like the Commission in *Unistar*, DEP needs this site-wide resource information to determine the effect of the proposed diversion on the resources. The recent precedent in *Unistar* supports DEP’s request and requires the Petitioner to provide the requested information.

DEP has consistently requested overall site resource information throughout its administration of the water diversion permit program.

DEP's interpretation and request to the Petitioner is further supported by its consistency in requesting comprehensive site information before issuing diversion permits. Many water diversions have as part of their effect some overall site impact. DEP consistently requires information on and analyzes the full scope of resources at these sites to ensure the proposed diversion is consistent with the applicable statutory and regulatory provisions. For example, a diversion permit issued to a new golf course for irrigation is based on an understanding by DEP of the course design and construction and the impact to on-site water quality and wetlands resources. (DEP Br., Exhibits D, F, G and L to Gilmore affidavit.) The course that will be irrigated is an effect of the diversion. To interpret it otherwise would make the purpose of the diversion irrelevant. The need for the water is considered in permitting decisions and balanced against the potential impacts from the diversion.

DEP has provided a series of documents that show the Department consistently directs applicants for large-scale projects that require diversion permits to submit complete site information, including wetland and wildlife information. This consistent approach includes DEP's interaction with operations similar to Tilcon's. (DEP. Br., Exhibits N, O, and P to Gilmore affidavit.)³ "[T]he practical interpretation of legislative acts by governmental agencies responsible for their administration is a recognized aid to statutory construction." *New Haven v. United Illuminating Co.*, 168 Conn. 478, 493 (1975) (internal citations omitted.) DEP's longstanding approach to gathering the information necessary to understand the effects of a diversion, as evidenced by documents provided from its files, supports the DEP's interpretation of its authority.

³ Tilcon asserts, admittedly without reviewing the files, that DEP never received the information it requested from other quarry operations yet issued the permits anyway. There is nothing in the record to support this. The assertion ignores memos to the file that describe staff's understanding of site-wide wetlands issues and future mining activities at these sites. (DEP. Br., Exhibits N, O, and P to Gilmore affidavit.)

Tilcon's hardship arguments are not supported by the Diversion Act or its regulations.

Tilcon also argues that supplying the information represents a hardship. These hardship arguments do not provide legal support to Tilcon's arguments that DEP has exceeded its authority. They are not based on any language in the statute, but I will nevertheless speak to them. First, Tilcon indicates that providing such information on site activities for a 25-year period in the future cannot be done with any degree of accuracy due to the fluid nature of the mining business. The 25-year permit term is the maximum permit term that DEP can give. If Tilcon does not feel comfortable with providing such information for this length of time, then it can provide a subset of this information in exchange for a shorter permit term. Tilcon itself has indicated that there is a long-term history of excavation at these sites. It seems reasonable that Tilcon would have information from this site history that can be used to estimate future use and excavation. The record provides no indication that Tilcon attempted to discuss an acceptable approach to providing this information or to clarify the level of detail DEP requires. Instead it simply refused to supply any of the requested information. Next, Tilcon presents the financial cost of supplying the requested information.. The financial burden of applying for a twenty-five year permit is not a factor for consideration in the Diversion Act, as DEP correctly asserts in its reply brief.

The delegation of authority to local land use agencies or other DEP divisions does not impact DEP's overall authority to request site information.

Finally, the Petitioner argues that the delegation of authority over certain issues, e.g. excavations, wetlands, wildlife, or water quality, to local land use agencies or to other divisions of DEP impacts IWRD's authority to request information required by the Diversion Act. It is the statute that requires information on the scope of the diversion, impacts to wetlands, effect on water quality, and a description of the water system. The first priority is to collect this information and the second is to be sure the correct personnel with the requisite expertise review it. The Divisions within DEP consistently rely on each other for review and comment on permit application materials that are within the expertise of a given division. The fact that DEP has established an effective division of labor along the lines of technical expertise and subject matter does not mean the overall authority of DEP to collect site information is somehow compromised.

Likewise the separate authority of local land use agencies is distinct from the DEP's authority over the water diversion program. One does not necessarily limit the other unless specifically provided for in statute.⁴ This argument does not provide any legal support for refusing to supply additional information requested under DEP's authority under the Diversion Act.

The information requested by IWRD is within the DEP's authority under the Diversion Act. Tilcon is required to submit this information to complete its application.

Question 2

Question 2 applies only to the Petitioner's North Branford facility and asks: "[w]hen an applicant for a water diversion permit already has obtained a local wetlands permit for activities that are located on the diversion site but are hydraulically unrelated to the diversion, may the DEP, processing a diversion permit application, demand information regarding such wetlands and regulated activities and regulate those activities again?"

Conclusions

The Petitioner argues that DEP may not seek information on certain wetlands and activities affecting those wetlands on the North Branford site because they are hydraulically unrelated to the proposed diversions and because that activity and its impact to these wetlands was permitted by the North Branford Conservation and Inland Wetlands and Watercourse Agency (CIWWA). The Petitioner acknowledges that there is overlapping jurisdiction between DEP and CIWWA but again focuses on *Tilcon's* determination that the site activities and the wetlands are hydraulically unrelated to the withdrawal of water from on-site basins. As discussed above in the answer to question one, the DEP has not determined that Tilcon's water diversion is limited to its withdrawal from these basins. Its mining activities may result in the withdrawal from the instantaneous flow of the waters of the state. Furthermore, DEP is not required to accept the limited information provided in the Petitioner's application simply because

⁴E.g. The legislature specifically exempts projects receiving a dam safety permit from the need for a local inland wetlands permit. CGS §22a-403(b).

the Petitioner has determined that it sufficiently characterized the limit of impact from the diversion. The *Unistar* case supports DEP's request for further information contemplated by the statute and regulations. This includes information on inland wetlands and watercourses and will likely include information typically provided to a local wetlands commission.

When evaluating impacts from water diversions on wetlands, there is no bright line between the responsibility and jurisdiction of the DEP and the local wetlands authority. The Diversion Act provides DEP separate and broad authority to review the wetlands impacts of diversion activities. This authority is not limited by the fact that local inland wetlands agencies are delegated authority to issue permits to conduct regulated activities. It is important for DEP to examine the effect of the diversion on inland wetlands separately under this separate grant of authority because the impacts may differ from impacts to wetlands from activities regulated by the Inland Wetland and Watercourse Act.

Again, the legislature carved out a number of exemptions to the Diversion Act's permitting requirements and DEP used its regulatory authority to do the same. If the legislature wished to exclude activities already permitted by the local wetlands commission it would have done so. Instead the legislature recognized the need for separate authority and review under the Diversion Act and authorized DEP to carry out the regulation of diversion activities as defined in the Act. In the numerous matters that come before local wetlands commissions, DEP's authority to regulate water diversions rarely overlaps with the authority delegated to local wetlands commissions to review regulated activities. However, in the unusual circumstances presented by Tilcon's application, where overlap exists, each entity's authority must remain separate and intact.

Question 3

Question 3 applies only to the Petitioner's North Branford facility and asks: "[m]ay the DEP decline to process or delay processing an NPDES permit renewal on the ground that the applicant has not supplied to the DEP requested additional information regarding a pending water diversion permit application?"

Conclusions

The National Pollution Discharge Elimination System (NPDES) program is authorized by federal law and administered by the Environmental Protection Agency. The EPA can delegate its authority to administer the NPDES permit program to states through a rigorous approval process and has delegated this authority to Connecticut. As part of this delegation, Connecticut is required to implement the provisions of the Clean Water Act articulated in the federal regulations and is authorized to modify these federal provisions, including the federal requirements for applications articulated at 40 CFR 122.21, to impose more stringent requirements. 40 CFR 123.25(a).

Under its delegated authority to impose stricter requirements, DEP promulgated its own regulations that include specific authority to delay processing a completed NPDES permit application when a related permit application is incomplete or may be denied. RCSA §22a-430-4(d)(3). This delay ensures that a NPDES permit is not issued when related concerns among permit programs are not sufficiently addressed. In this matter, the NPDES permit would authorize the discharge of quarry water to wetlands and watercourses downstream of the North Branford facility. The removal of this water from the quarry must be authorized by a diversion permit. The related diversion permit application for the North Branford site is incomplete because DEP has not been provided the site information requested on October 21, 2008. Staff members from the NPDES permit program are aware that IWRD's concerns about the diversion permit application for North Branford have not been addressed and as a result cannot determine that the proposed discharge will comply with applicable standards. (DEP Br. Inglese affidavit.)

DEP's approach to the Petitioner's NPDES application for its North Branford site is authorized by state and federal law and was correctly employed by DEP staff.

CONCLUSION

After a review of the relevant legal standards and the application of those standards to the specific circumstances in this matter, I conclude that DEP staff acted within the scope of its

authority under the Diversion Act when it requested additional information from the Petitioner on October 21, 2008. The Diversion Act and the associated DEP regulations require DEP staff to gather information on and consider the impacts of the proposed diversion. Further, the applicant for a diversion permit is required to provide this information. DEP's authority to request information is not limited by the *applicant's* determinations of the impacts associated with the proposed diversion. Instead, DEP must independently assess the environmental resources potentially affected by the proposed activity and the impact the proposed activity will have on those resources. Specifically, the Diversion Act requires DEP staff to evaluate impacts of a proposed diversion on wetland habitats, wildlife, flood management, drainage, and water quality. Therefore, DEP must seek information on the environmental resources and parameters potentially affected by the proposed activity.

DEP's attempt to perform its statutory duties did not exceed the authority provided by the Act because staff's request to the Petitioner for additional site information did focus on wetlands, wildlife, water quality, flood management and drainage issues; the very issues for DEP's consideration cited in the Act and the regulations. The limitation on this authority argued for by the Petitioner is not within the express language of the statute and demonstrates a misunderstanding of the Act's application to Tilcon's activities. Throughout the Act's history, DEP has consistently applied its broad authority to seek site related information it deems necessary to understand and determine the proposed activity's impact. As held by the Connecticut Supreme court in *Unistar*, DEP is not required to prove an activity's impact or accept an applicant's determination of this impact before it requests such information.

Similarly, prior approvals of regulated activity by the local inland wetlands commission do not preclude DEP from seeking information on wetlands resources and diversion activities associated with those resources at the Petitioner's North Branford site. The Diversion Act and its regulations specifically and separately authorize DEP to collect information on wetlands to understand a proposed diversion's impact on those wetlands. The separate authority of the local wetlands commission does not impact DEP's authority.

Finally, DEP regulations specifically authorized DEP staff to delay processing the Petitioner's NPDES application for the North Branford site because the related water diversion application was incomplete. This regulation is clearly within the scope of DEP's authority to administer the NPDES permit program on behalf of EPA.

Amey W. Marrella
Amey W. Marrella, Commissioner

3/19/10
Date

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To the attached list of officials designated by Conn. Gen. Stat. §22a-371(d)

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