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Connecticut's Evolving Views of Riparian Rights and the Public Trust

Terence H. McAllister
Boston College Law School, terence.mcallister@bc.edu

CONNECTICUT'S EVOLVING VIEWS OF RIPARIAN RIGHTS AND THE PUBLIC TRUST

TERENCE H. MCALLISTER*

Abstract: *Waterbury v. Washington* came to the Connecticut Supreme Court as a dispute over water rights that could have been resolved via a number of statutory or common law doctrines. Instead, the court sought to articulate a uniform theory of riparian law in Connecticut, acknowledging all of these competing doctrines. This uniform theory was one of regulated riparianism. After articulating this standard, the court left many decisions to be worked out by lower courts. Since *Waterbury* was decided, those lower courts have struggled to incorporate a view that reconciles the public trust doctrine in light of Connecticut's statutory scheme. Many of these struggles will need resolution before important public trust questions in Connecticut can be approached with a sense of certainty.

INTRODUCTION

The earliest civilizations depended on the natural flooding of rivers to perfect their transportation and irrigation practices.[1] Many centuries later, the flow of rivers provided an abundant power source for the Industrial Revolution.[2] These two transformative epochs had long-term benefits and disastrous consequences for people living near waterways.[3] As a result, riparian law developed to mitigate these negative consequences and preserve the utility of such waterways.[4] Regulating the use of rivers, riparian law must be particularly versatile because of the numerous uses for these natural resources.[5] Therefore, it is important for riparian law to evolve to best bal-

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[1] *See* Christof Mauch & Thomas Zeller, *Rivers in History and Historiography: An Introduction*, *in* RIVERS IN HISTORY: PERSPECTIVES ON WATERWAYS IN EUROPE AND NORTH AMERICA 1–2 (Christof Mauch & Thomas Zeller eds., 2008).

[2] *Id.* at 2.

[3] *Id.* at 3; Christopher C. French, *Insuring Floods: The Most Common and Devastating Natural Catastrophes in America*, 60 VILL. L. REV. 53, 57–58 (2015).

[4] Scott B. Simpson, Note, *Forging Connecticut's Water Policy Future: Registered Diversions, Riparian Rights and the Courts After* Waterbury v. Washington, 8 CONN. PUB. INT. L.J., Spring 2009, at 85, 85–86.

[5] *Id.*

ance these needs.[6] *City of Waterbury v. Town of Washington* is an excellent example of riparian law balancing competing interests that developed from increased human activity along river banks.[7] In this instance, the need for safe drinking water was at odds with a desire for recreational space.[8]

Common law doctrines have historically attempted to strike a balance between competing interests.[9] The common law system of riparian rights protects the enjoyment of downstream users from encroachment by those upstream.[10] In *Waterbury II*, the Connecticut Supreme Court signaled that the common law system of riparian rights followed in prior years may no longer be applicable to the contemporary era.[11] The court then endorsed a new system known as regulated riparianism, which seeks to place the rights of water users within a statutory framework.[12]

The use of formal statutes and laws to regulate actions affecting the environment has grown significantly in recent decades.[13] In Connecticut, many of these new laws deal with and overlap with traditional riparian interests.[14] The benefits of these laws—certainty and permanence—can also be viewed as detrimentally inflexible.[15] *Waterbury II* is an important case because it offers some signals as to how Connecticut courts will handle these clashes in the future.[16] This guidance, however, is not particularly rigid and lower courts working within this new framework have had to adapt the precedent set by *Waterbury II* to the unique cases and controversies before them.[17]

This Comment examines some of the changes ushered in by *Waterbury II* and the questions that decision left open.[18] Particularly, this Comment

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[6] *See* City of Waterbury v. Town of Washington (*Waterbury II*), 800 A.2d 1102, 1111 (Conn. 2002).

[7] *See Waterbury II*, 800 A.2d at 1111.

[8] *Id.*

[9] *See* Joseph W. Dellapenna, *The Evolution of Riparianism in the United States*, 95 MARQ. L. REV. 53, 54 (2011).

[10] *See id.*

[11] *See Waterbury II*, 800 A.2d at 1155.

[12] *See id.* at 1155; AM. SOC'Y OF CIVIL ENG'RS, REGULATED RIPARIAN CODE, at viii (2004).

[13] Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 551 (2007) (noting that statutory expansion has been prevalent in the environmental field since the 1970s).

[14] *See* CONN. GEN. STAT. §§ 25–102qq, ww (2017); *Waterbury II*, 800 A.2d at 1123.

[15] *See* Klass, *supra* note 13, at 582–83.

[16] *See Waterbury II*, 800 A.2d at 1155–56.

[17] *See e.g.,* Friends of Animals, Inc. v. United Illuminating Co., 6 A.3d 1180, 1198–99 (Conn. App. Ct. 2010) (discussing a trial court's efforts to apply *Waterbury II* to a parakeet eradication scheme); Comm. to Save Guilford Shoreline, Inc. v. Arrow Paving, No. CV064020284S, 2007 WL 901573, at *3 (Conn. Super. Ct. Mar. 2, 2007) (discussing a trial court's efforts to apply *Waterbury II* to the expansion of a paving business).

[18] *See infra* notes 94–137 and accompanying text.

focuses on how these changes affect the relationship between statutory and common law, and how lower courts have been able to further clarify *Waterbury II's* holdings.[19]

I. FACTS AND PROCEDURAL HISTORY

The Shepaug River watershed encompasses the towns of Cornwall, Goshen, Warren, and Litchfield, Connecticut.[20] The Shepaug River flows through the towns of Washington and Roxbury, serving as a source of potable water and a recreational resource to the people of Connecticut and visiting tourists.[21] The residents of Waterbury primarily divert water from the Shepaug River to meet their needs for potable water.[22] Waterbury manages its own water supply, and dammed the river in 1933 to supplement the water that the city pulls from several local reservoirs.[23]

The condition of the Shepaug River is intricately tied to the fortunes of residents along its banks.[24] The city of Waterbury's good fortune during the Industrial Revolution led to an 1893 General Assembly decree allowing Waterbury to utilize the majority of local water sources to meet the needs of its growing population.[25] Two reservoirs, the Wigwam and Morris, were built to alleviate demands for potable water.[26] The Wigwam Basin feeds both of these reservoirs.[27] In 1917, an artificial tunnel was constructed to feed the Wigwam Reservoir via the Shepaug River.[28] At the time of trial in *City of Waterbury v. Town of Washington*, water left the Shepaug Reservoir via three routes: (1) diversion via the tunnel, (2) spillage from the reservoirs into the Shepaug River, or (3) via an eight-inch pipe.[29]

In 1921, Waterbury and Washington executed a contract in which Washington pledged not to reduce the river's summer stream flow below 1.5 million gallons per day ("MGD").[30] The parties also agreed that Water-

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[19] *See infra* notes 94–137 and accompanying text.

[20] City of Waterbury v. Town of Washington (*Waterbury I*), No. X01UWYCV970140886, 2000 WL 670075, at *1 (Conn. Super. Ct. May 1, 2000).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *See id*. at *5.

[25] *Id*. Mills and manufacturing brought expansion to Waterbury, increasing its water needs; this strain on the river, coupled with some dry years, caused concern among Waterbury residents regarding its water supply. *Id.*

[26] *Id.* at *1.

[27] *See Waterbury II*, 800 A.2d at 1112.

[28] *Waterbury I*, 2000 WL 670075, at *1. This tunnel was a seven and one half miles long, connecting the Shepaug River and Wigwam Basin. *Id.*

[29] *Id*. at *9. This pipe is in the base of a dam in the river, and if left open, releases 4.9 million gallons of water per day. *Id.*

[30] *Id*. at *6.

bury would only utilize the resource to the extent necessary to meet the needs of its residents.[31] In 1988, Waterbury built a water treatment plant, which ultimately became the root cause of the dispute in *Waterbury II*.[32] The portion of the river that the water treatment plant affected was approximately twenty-seven miles long.[33] The design of the water treatment plant made it more efficient for the town to draw water from the Pitch and Morris Reservoirs, so as a result the town reduced its use of the Wigwam Reservoir.[34] This change significantly increased the burden on the Shepaug River.[35] Official records indicate that the increased demand on the Shepaug River was unnecessary, given other available sources of potable water.[36]

Numerous local municipalities and groups took issue with Waterbury's management of the dam and its water system.[37] These groups were not concerned with the dam's existence, but rather felt that Waterbury managed the dam with too little regard for the natural environment.[38] Specifically, these parties argued that diversions caused insufficient flow of water during the summer, harming river organisms and affecting recreation and fishing.[39]

The dispute between Waterbury and Washington came to the Connecticut Supreme Court via a fairly circuitous route.[40] Initially, Washington and the other defendants brought their concerns to the Connecticut Department of Environmental Protection and the Connecticut Department of Public Health, but neither organization was able to effectively settle the dispute.[41] Washington, concerned with the effect these challenges would have on its public image, sued for injunctive relief in 1997.[42] A countersuit was brought alleging that Washington had violated a 1921 contract, as well as the Connecticut Environmental Protection Act ("CEPA"), and had created a nuisance in violation of riparian rights.[43] These cases were consolidated for trial with Washington listed as the plaintiff and Waterbury the defendant.[44]

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[31] *Id.* at *8.
[32] *See Waterbury II*, 800 A.2d at 1113.
[33] *Waterbury I*, 2000 WL 670075 at *7.
[34] *Id.* at *1.
[35] *Id.*
[36] *Id.*
[37] *Id.* at *3. These groups include the town of Washington, the Steep Rock Association, the Town of Roxbury, the Roxbury Land Trust, and the Shepaug River Association. *See id.*
[38] *See id.*
[39] *Id.* at *1.
[40] *See Waterbury II*, 800 A.2d at 1115–16.
[41] *Id.*
[42] *See id.* Waterbury was concerned that state administrative agencies tended to side with the defendants, and sought to head off possible negative administrative decisions. *See id.*
[43] *Id.*
[44] *Id.*

The trial court ruled that the diversion of water from the Shepaug River did not constitute a nuisance.[45] The trial court also found, though, that the manner of the dam's operation violated CEPA because it was an unreasonable impairment of the public trust.[46] The court then ordered a complex scheme for relief, setting out the amount of water in MGD to be released from the dam into the Shepaug River throughout the year.[47] Waterbury appealed these decisions and Washington filed cross appeals.[48] Ultimately, the Connecticut Supreme Court took up the appeals from Waterbury and Washington.[49]

There, the court heard four claims brought by Waterbury.[50] Waterbury argued that its use of water (1) did not constitute a breach of contract, (2) did not violate CEPA, (3) did not create a public or private nuisance, and (4) did not violate any riparian rights.[51] In response, the defendants claimed that Waterbury's use of the water (1) violated CEPA, (2) created a public nuisance, (3) created a private nuisance, (4) violated Washington's riparian rights, and (5) breached the1921 contract.[52]

The bulk of the court's analysis concerned Waterbury's CEPA claims.[53] The court held that Waterbury and the other defendants were not required to exhaust all administrative resources prior to bringing a claim under CEPA and that the trial court's finding of unreasonable impairment was incorrect.[54] The court suggested that the determination of whether an unreasonable impairment had occurred rested in the analysis of another statute: the "minimum flow statute."[55]

II. LEGAL BACKGROUND

The Connecticut Environmental Protection Act of 1971 ("CEPA") offers declaratory and equitable relief to those harmed by environmental damage in Connecticut.[56] CEPA serves as the statutory embodiment of the pub-

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[45] *Id.* at 1115–16.

[46] *See id*.

[47] *Waterbury I*, 2000 WL 670075 at *40.

[48] *Waterbury II*, 800 A.2d at 1109–10.

[49] *Id*. at 1110 n.1. The appeals were transferred from the Connecticut Appellate Court to the Connecticut Supreme Court via a statute that allows the Connecticut Supreme Court to transfer certain cases to itself. CONN. GEN. STAT. § 65-1 (2017); *Waterbury II*, 800 A.2d at 1110 n.1.

[50] *Waterbury II*, 800 A.2d at 1110.

[51] *Id.*

[52] *Id.* at 1110–11.

[53] *See id*. at 1116–47.

[54] *See id.* at 1120–21.

[55] *Id*. at 1138–39. Sections 26-141a through 26-141c of the Connecticut General Statutes, a subsection of the Connecticut Environmental Protection Act of 1971, are commonly referred to as the "minimum flow statute." *Id.*; *see* CONN. GEN. STAT. §§ 26-141a–c (2017).

[56] CONN. GEN. STAT. § 22a-16 (2017).

lic trust doctrine in Connecticut.[57] Virtually any entity in the state may bring a suit under CEPA, and suits can be brought against a similarly broad scope of defendants.[58] The law seeks to protect the public trust in the air, water, and natural resources of Connecticut by creating a cause of action whenever these resources are unreasonably polluted, impaired, or destroyed.[59]

The statutory scheme in Connecticut protects the minimum flow of water in stocked watercourses, and creates a system of permits for diverting water from rivers.[60] This system is embodied in the minimum flow statute portion of CEPA.[61] Although CEPA does not define when a resource is impaired, this statutory scheme suggests that the state views any reduction or diversion of the natural flow of a river as an impairment.[62] In *City of Waterbury v. Town of Washington* the Connecticut Supreme Court found that this suggestion comported with the plain meaning of impairment and did not require further examination.[63]

Impairment alone is not sufficient to constitute a violation of the minimum flow statute and CEPA generally, rather the violation must also be unreasonable.[64] Two methods for defining an unreasonable impairment exist.[65] One method is to assert that any legitimate cause of action where impairment exists is sufficient.[66] This method only prevents suits intended to harass the defendant and will allow judicial scrutiny of every impairment in order to determine whether it is unreasonable.[67] The second method would be to base an argument of unreasonableness on what the legislature intended "reasonable" and "unreasonable" to mean under CEPA.[68] In *Waterbury*, the court held that Connecticut utilizes the second method.[69]

Section 22a-17(a) of the CEPA offers an affirmative defense to defendants if there is no alternative to their conduct and their actions are necessary

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[57] *See id.*
[58] *See id.*
[59] *Id.*
[60] *Id.* § 26-141a.
[61] *Id.*
[62] *See* City of Waterbury v. Town of Washington (*Waterbury II*), 800 A.2d 1102, 1131 (Conn. 2002).
[63] *Id.* This treatment contrasts with other states, which offer more stringent definitions. *See* City of Portage v. Kalamazoo Cty. Rd. Comm'n, 355 N.W.2d, 913, 915 (Mich. Ct. App. 1984) (positing a five factor test). For example, in Michigan the state's environmental protection statute has been interpreted to utilize a four-part test to determine whether a water course is impaired. *See id.* (positing a five factor test).
[64] CONN. GEN. STAT. § 26-141a.
[65] *Waterbury II*, 800 A.2d at 1132.
[66] Manchester Envtl. Coal. v. Stockton, 441 A.2d 68, 76 n.10 (Conn. 1981).
[67] *Id.*
[68] *Waterbury II*, 800 A.2d at 1133.
[69] *Id.*

to ensure public health and safety.[70] Therefore, the court has held that impairment under the CEPA may be more than de minimis, and yet still be considered reasonable.[71]

Individual statutes must be read for consistency with the entire environmental scheme in Connecticut.[72] This allows individuals to determine the meaning of the law by analyzing related laws together, offering uniformity.[73] As such, unreasonableness cannot be found when an activity specifically complies with another law that governs the action.[74]

The other statute most relevant to impairing a river via damming is through the minimum flow statute portion of CEPA.[75] In particular, the minimum flow statute allows the Commissioner of Energy and Environmental Protection to set standards regarding the flow of waters that are stocked with fish and impounded or diverted by dams or other structures.[76] A stocked watercourse is defined as any watercourse in which the State has placed a species of commercial or game fish.[77] As this language does not segment or divide the watercourse in any way, when stocking takes place at any point on a river, the entire river is considered stocked.[78] This statute is relevant to defining unreasonable impairment because it calls upon the Commissioner of Energy and Environmental Protection to take numerous considerations under advisement when issuing guidance.[79] These considerations include many factors, which do not specifically concern the stocked nature of a body of water.[80] Some relevant factors are flood protection, aquatic life, natural and stocked wildlife, public recreation, and public health and industry.[81]

These statutory schemes are additions to the traditional common law approach of riparian rights, which predominate in the eastern United States.[82] Riparian rights are the rights of downstream users to a river with minimal interference from those upstream.[83] Traditionally, these rights could be limited when an upstream user established an easement, but the

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[70] CONN. GEN. STAT. § 22a-17(a) (2017).
[71] *See id.*; *Waterbury II*, 800 A.2d at 1134.
[72] Doe v. Doe, 710 A.2d 1297, 1311 (Conn. 1998); *In re* Valerie D., 613 A.2d 748, 769 (Conn. 1992).
[73] *Doe*, 710 A.2d at 1311; *In re Valerie D.*, 613 A.2d at 769.
[74] *Doe*, 710 A.2d at 1311; *In re Valerie D.*, 613 A.2d at 769.
[75] *See* CONN. GEN. STAT. § 26-141a (2017).
[76] *Id.*; *Waterbury II*, 800 A.2d at 1143.
[77] CONN. AGENCIES REGS. § 26-141a-2(j) (2016).
[78] *Waterbury II*, 800 A.2d at 1143.
[79] *See* CONN. GEN. STAT. § 26-141b.
[80] *See id.*
[81] *See id.*
[82] Simpson, *supra* note 4, at 102–03.
[83] *Id.* at 93.

easement could be challenged before it was established.[84] The requisite time for establishing a prescriptive easement in Connecticut is fifteen years.[85] The use of this easement must be open, visible, continuous, and uninterrupted during that time period.[86] These requirements serve to put the owner of a property on notice that someone is utilizing their land.[87] If the owner is or should be on notice that other individuals are utilizing the land, courts will allow the use to continue after an extended period of use, despite the owner's objection.[88]

One must determine the scope of riparian rights to determine when an easement is created and to define the scope of the easement.[89] Natural flow theory, which states that riparian owners are entitled to use a river or stream as it flows over their property, informs riparian rights in Connecticut.[90] Other owners may not interfere with the rate or quantity of flow and vice versa.[91] Therefore the rights over which an easement is created pertain to the amount of water or rate of flow.[92] Interference with a river's flow in an open, visible, continuous, and uninterrupted manner for fifteen years will thereby create a prescriptive easement.[93]

III. ANALYSIS

The *City of Waterbury v. Town of Washington (Waterbury II)* decision had two significant impacts on environmental law in Connecticut.[94] First, the insistence of viewing the public trust doctrine in light of existing statutory schemes could have potentially limiting effects on environmental standing.[95] Second, the transition to a regulated system of riparianism is a novel development, which overhauls the philosophy of riparian law in the state.[96] Each of these impacts is significant, but how they will play out practically remains unclear.[97]

The lower courts in Connecticut have struggled in adapting to these changes, and the status of Connecticut's environmental law remains in flux

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[84] *Id.*
[85] Cty. of Westchester v. Town of Greenwich, 629 A.2d 1084, 1087 (Conn. 1993).
[86] *Id.*
[87] *See id.*
[88] Klein v. De Rosa, 79 A.2d 773, 775 (Conn. 1951).
[89] *See Waterbury II*, 800 A.2d at 1149.
[90] *See id.*; Harvey Realty Co. v. Wallingford, 150 A. 60, 61 (Conn. 1930).
[91] *See Waterbury II*, 800 A.2d at 1149.
[92] *See id.*
[93] *See id.* at 1150–51.
[94] *See* City of Waterbury v. Town of Washington (*Waterbury II*), 800 A.2d 1102, 1149 (Conn. 2002); Simpson, *supra* note 4, at 269–70.
[95] *See Waterbury II*, 800 A.2d at 1155.
[96] *See id.*
[97] *See id.* at 1155–56.

fifteen years after the Connecticut Supreme Court's decision in *Waterbury II*.[98] This lack of clarity stems from the fact that the parties in *Waterbury* settled prior to remand, and the only question ever answered by the lower courts dealt with the extent of Waterbury's easement.[99] The court answered this question largely in Waterbury's favor.[100]

The concept of regulated riparianism is enshrined in the Regulated Riparian Model Water Code ("Code").[101] The Code seeks to remedy longstanding concerns in the scientific and legal communities that traditional models of riparianism were not coherent with new realities of supply and demand.[102] Its most basic premise is that "waters of the state" are state property and subject to legal state control.[103] A major effect of this is centralization—the Code seeks to centralize the management of water under a coherent set of rules, whereby state agencies can take a broader, longer-term view of potential needs.[104] Previously the traditional model on the east coast had been to allow the common law to regulate the market; however, numerous states have added statutory frameworks that alter the common law.[105] *Waterbury* is evidence that Connecticut is embracing this shift, as the Connecticut Supreme Court directly stated that Connecticut is no longer a purely riparian state.[106]

The court also addressed seemingly inconsistent interpretations of Connecticut's public trust doctrine.[107] The public trust doctrine has long been an important tool in citizen suits against individuals, groups, or state actors who harm the environment.[108] The doctrine is broad, and based on the view that a healthy environment is a public right.[109] In Connecticut, the public trust doctrine is embodied by the Connecticut Environmental Protection Act of 1971 ("CEPA"), which protects the air, land and water.[110]

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[98] *See* Friends of Animals, Inc. v. United Illuminating Co., 6 A.3d 1180, 1198-99 (Conn. App. Ct. 2010); Comm. to Save Guilford Shoreline, Inc. v. Arrow Paving, No. CV064020284S, 2007 WL 901573, at *3 (Conn. Super. Ct. Mar. 2, 2007).

[99] City of Waterbury v. Town of Washington (*Waterbury III*), No. X06CV970140886S, 2006 WL 2130366, at *1–2 (Conn. Super. Ct. July 13, 2006).

[100] *See id.* at *2.

[101] *See generally* AM. SOC'Y OF CIVIL ENG'RS, REGULATED RIPARIAN CODE (2004) (articulating a modern system of riparian rules).

[102] Robert E. Beck, *The Regulated Riparian Model Water Code: Blueprint for Twenty First Century Water Management*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 113, 115–16 (2000).

[103] *See id.* at 160.

[104] *See id.* at 160–61.

[105] *Id.* at 113–14.

[106] *See Waterbury II*, 800 A.2d at 1155.

[107] *See id.* at 1123.

[108] *See id.*

[109] *See* CONN. GEN. STAT. § 22a-16 (2017).

[110] *See id.*

The bulk of the *Waterbury* decision involves evaluating the prima facie elements of a CEPA claim.[111] To conduct this evaluation, the Connecticut Supreme Court first had to define the terms "impairment" and "unreasonable impairment."[112] The court held that unreasonable impairment could only be defined in light of an on-point statutory scheme.[113] The effects of this interpretation have been limiting.[114]

In *Waterbury*, the Connecticut Supreme Court also considered a de minimis standard of reasonableness, which would classify all but the most trivial impairments as unreasonable.[115] The court rejected this de minimus standard, as the court viewed it as too permissive.[116] Subsequent cases have shown that, although *Waterbury* proffers a much stricter standard than de minimis, it leaves uncertainty in circumstances where no statutory scheme exists.[117] Furthermore, there are times when a de minimis interpretation of CEPA would point to the existence of a public trust violation, but the existence of a contrary statutory scheme is determinative.[118]

Friends of Animals, Inc. v. United Illuminating Co. demonstrates the potentially limiting effect of the *Waterbury* decision.[119] The case concerned an electrical company's practice of killing or capturing parakeets that nested on its equipment.[120] In *Friends of Animals*, a citizen group brought a suit under CEPA, claiming the killing of the parakeets was a violation of the public trust.[121] The Connecticut Appeals Court utilized *Waterbury* in its determination that the actions could not violate the public trust because the

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[111] *See Waterbury II*, 800 A.2d at 1116–30. Prima facie means sufficient to establish a fact prior to rebuttal. *Prima Facie*, BLACK'S LAW DICTIONARY (10th ed. 2014). The court in Waterbury uses this phrase referencing claims that must be established before addressing affirmative defenses. *See Waterbury II*, 800 A.2d at 1116–30.

[112] *See Waterbury II*, 800 A.2d at 1131.

[113] *See id.* at 1135–37.

[114] *See id.* at 1135; *Friends of Animals*, 6 A.3d 1180, 1197–99; *infra* notes 123–31 and accompanying text (demonstrating an example of the limiting effects).

[115] *See Waterbury II*, 800 A.2d at 1135; *see also Friends of Animals*, 6 A.3d at 1197–99. (affirming that the de minimus standard was not utilized in Connecticut under the Connecticut Environmental Protection Act of 1971).

[116] *See Waterbury II*, 800 A.2d at 1135.

[117] *See* Matteo v. Mann, No. CV085022203, 2009 WL 1142581, at *2 (Conn. Super. Ct. April. 1, 2009); *see also Comm. to Save Guilford Shoreline*, 2007 WL 901573 at *3 (showing the lower courts struggle to provide a definition for unreasonable impairment when there was not on point statute to rely on).

[118] *See Friends of Animals*, 6 A.3d 1180 at 1197–99.

[119] *See id.* at 1198.

[120] *Id.* at 1182. These non-native birds concerned the utility company because of the tendency of their nests to catch fire and interrupt service. Avi Salzman, *Eradication of Parakeets Draws Protest*, N.Y. TIMES, Nov. 27, 2005, at 14CN. The nests weighed between ten and two hundred pounds, and could house as many as fifty parakeets. *Id.* The utility company claimed several other methods of control had been unsuccessfully attempted. *Id.*

[121] *See* 6 A.3d at 1183.

killings of these parakeets were allowed under Connecticut's Wild Bird Act.[122]

Friends of Animals represents a fairly typical scenario in which the prima facie standard set forth in *Waterbury* is not met.[123] The de minimis standard rejected by the Connecticut Supreme Court would most likely have allowed *Friends of Animals* to move forward.[124] There, plaintiffs had legitimate concerns about the ecological effects of removing parakeets from Connecticut's ecosystem, and were not bringing the suit merely to harass the defendants.[125] Although the *Waterbury* standard protects judicial resources by limiting the number of public trust violation cases, the inability of groups like Friends of Animals to move forward in the judicial system may allow environmentally harmful practices to persist.[126]

Therefore, the Connecticut Supreme Court's decision may have regrettable effects when a lawsuit is kept out because a relevant statute exists that protects the challenged behavior—rather, the prima facie standard remains a workable test in these instances because of its flexibility.[127] The law needs to establish a balance between allowing claims and conserving judicial resources.[128]

A more legally significant issue is the court's failure to offer guidance on what to do when there is no relevant statute.[129] At least three possibilities seem to exist in this scenario: (1) the legislature has not defined public trust, and the plaintiff cannot establish cause due to lack of standing, (2) a review of analogous legislation should be conducted to determine which way the legislature might vote in the future, or (3) traditional common law should be applied without reference to the statutory scheme, and the de minimis test is utilized.[130]

The decision in *Committee to Save Guilford Shoreline, Inc. v. Arrow Paving* illustrates some of the uncertainty created by *Waterbury*.[131] The Connecticut Superior Court's uneasiness with its interpretive quandary is evident from its request to preserve evidence should the court's final deci-

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[122] *See id.* at 1197. The Wild Bird Act contains an exception for parakeets when they nest in substantial numbers, and therefore would preclude United Illuminating's killing of parakeets from its ambit. CONN. GEN. STAT. § 26-92 (2017).

[123] *See Waterbury II*, 800 A.2d at 1135–37; *Friends of Animals*, 6 A.3d at 1198.

[124] *See Waterbury II*, 800 A.2d at 1135–37; *Friends of Animals*, 6 A.3d at 1197.

[125] *See Waterbury II*, 800 A.2d at 1135–37; *Friends of Animals*, 6 A.3d at 1197.

[126] *See Friends of Animals*, 6 A.3d. at 1182–83. These concerns included the fact that parakeets had lived in the area for decades, fed on undesirable weeds and plants, and provided ecological diversity. *Id*.

[127] *See Waterbury II*, 800 A.2d at 1135–37; *Friends of Animals*, 6 A.3d at 1197.

[128] *See Waterbury II*, 800 A.2d at 1135–36.

[129] *See id.* at 1136–37.

[130] *See id.*

[131] *See* 2007 WL 901573 at *3–5.

sion not stand.[132] The court went on to examine the different ways injunctive relief could be sought under § 22a-16 post *Waterbury II*.[133] It found that the violation of a statutory scheme replaced the requirement for injunctive relief that harm be irreparable.[134] Thus, the court created a situation where injunctive relief could be sought in two scenarios—either a statutory scheme was violated, or irreparable harm occurred.[135] The Superior Court's *Guilford* decision simultaneously gives teeth to the regulated riparian system embraced by the *Waterbury* court by allowing for equitable relief to be sought when a statutory scheme is violated.[136] Equitable relief in the second instance is sensibly left to the judge's discretion.[137]

CONCLUSION

City of Waterbury v. Town of Washington marks the beginning of a shift in Connecticut's riparian laws and broader environmental protection laws. The Connecticut Supreme Court's opinion in *Waterbury II* makes two important points about the direction of resource management. First, Connecticut will shift to a more statutorily regulated riparian system. This is justified by the premise that traditional riparian doctrine is no longer capable of performing the law's balancing function given the numerous demands placed on the waterways of the east coast. Second, the system moving forward will treat statutes as a first line of defense in determining who can seek equitable relief. The details of this second point were left unclear. If the *Committee to Save Guilford Shoreline, Inc. v. Arrow Paving* decision is any indication this system of statutes and regulations will be supported by common law and judicial discretion when new or politically unresolved questions emerge.

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[132] *See id*. at *1.

[133] *Id.*

[134] *Id.* at *4.

[135] *Id.* at *3. Injunctive relief is traditionally available as a solution to prevent harms that cannot otherwise be remedied. *Id.*

[136] *See Waterbury II*, 800 A.2d at 1135-37; *Comm. to Save Guilford Shoreline*, 2007 WL 901573 at *3–5.

[137] *See Comm. to Save Guilford Shoreline*, 2007 WL 901573 at *5.