Journey to the Legal Horizon

Forestry and the Wetlands Act

Forestry is another one of the activities that is, at least in part, covered by the exemption provisions of the wetlands act. I'm written a number of articles on the farming exemption in this column. Forestry is a form of agriculture, as far the legislature is concerned. The statutory definition of "agriculture" and "farming," found in CT General Statutes § 1-1(q), "shall include . . . forestry . . ." *If your agency has adopted the 2006 DEP Model Regulations, you will find § 1-1(q) as an appendix to your regulations.* If a regulatory scheme hasn't established a definition of "agriculture," then the general definition will apply. The wetlands act hasn't, so § 1-1(q) is the place to look. End of discussion. Your agency cannot exclude forestry from the definition of agriculture.

Again, as with farming proposals, the wetlands agency determines whether the activity is exempt. Maybe your agency calls it a "jurisdictional ruling" or a "determination of exemption." Hopefully, the agency is not requiring the use of a permit application. That will confuse the agency members into thinking that they consider alternatives and revise the proposal. This is an up-or-down decision: it falls within the exemption or it does not. The challenging part, as with all agricultural activities, is determining whether *all* of the activities associated with the forestry operation are exempt, or if some are not included within the exemption provision, and thus still require a permit.

Section 22a-40 (a) in the wetlands act sets forth the exemption provision, also known as the activities permitted as of right. That means, if the activity falls within the activities listed, no wetlands permit is necessary. That is because wetlands agencies have authority over "regulated activities" which specifically exclude the activities listed in § 22a-40 (a). Either an activity is "regulated," and thus requires a permit, or it is exempt, and does not.

If the "activity" consists of many individual activities, you evaluate each activity separately. For example, let's say that the proposal includes(1) planting of blueberry bushes and fruit trees,(2) construction of a barn, (3) road construction directly related to getting the fruit to and from the barn, and (4)construction of a small dwelling for the farm family to live in. You are not free to determine that the <u>entire</u> proposal requires a permit because the construction of the house does not fall within the agricultural exemption.

DEP has created a resource that is very helpful to agencies and foresters conducting timber harvests: *Best Management Practices, 2007 Connecticut Field Guide*. This can be found on the DEP website at:
http://www.ct.gov/dep/lib/dep/forestry/best_management_practices/best_practicesmanual.pdf.
The resource offers guidance, not regulations. It stated objective is "to have an economically viable timber harvest that protects water quality and site productivity." The BMPs publication does not establish one uniform approach to conducting a timber harvest. Foresters who rely on that document to "authorize" their activities are mistaken. The wetlands agency has the right to determine whether activities fall within the exemption. On the other hand, agencies cannot use the BMPs manual to create a list of conditions that a forester must comply with, if the operations fall within the exemption.

Applying the exemption provision to a forestry operation, just like a traditional farming operation, involves a 2-step process. Step (1): Does the activity fall within the first sentence of § 22a-40(a)(1): "Grazing, farming, nurseries gardening and harvesting of crops and farm ponds of three acres or less . . ." The answer is yes, because as stated above, agriculture is defined to include forestry. Step (2): Does the second sentence of § 22a-40(a)(1) cause the activity to be removed from the exemption provision and brought back into the sphere of regulated activity? The second sentence reads: "*The provisions of this subdivision shall not be construed to include* ***road construction*** *or the erection of buildings* ***not directly related to the farming operation****, relocation of watercourses with continual flow,* ***filling*** *or reclamation of wetlands or watercourses with continual flow, clear cutting of timber except for the expansion of agricultural crop land, the mining of top soil, peat, sand, gravel or similar material from wetlands or watercourses for the purposes of sale.*"

(I'll explain in this article why I put certain words in boldface print.)

One activity commonly part of a timber harvest operation that is not common to a farming proposal is the use of temporary portable bridges, skid roads, "corduroy," etc. I hesitate to use the word "construction." The temporary access way is kept in place just as long as needed for the timber harvest. The felling of the trees is surely included in the meaning of "forestry." What about the ability to remove the felled trees from the property and sell the product? Isn't that integral to the forestry operation? DEP has gathered information anecdotally at two wetlands training conferences almost a decade apart, yielding the same results: *half the wetlands agencies determine the temporary road measures require a permit and half do not.*

For the agencies that determine the temporary road access activities to require a permit, possibly they rely on the word "fill" in the statute (see the boldfaced word "fill" in the statute above) to support their decision. They conclude that the placing of temporary portable bridges, "corduroy" and the like, despite being temporary and being totally removable, are "fill." Other agencies may look to the phrase "road construction . . .not directly related to the farming operation" (see the boldfaced word "fill" in the statute above). Here the reasoning gets murky. Some agencies would allow road construction if no materials were used in the road construction, because the materials = fill, which is referred to later in that same sentence (see above). I have heard Steve Tessitore, municipal liaison at DEP, espouse this position on a number of occasions. His position: if someone can use floodplain soils to drive a vehicle across, that road construction is allowed. However, to me, use of floodplain soils is not the construction of a road. The use of the word "construction" implies the use of materials. Steve and I agree to disagree on this point. With Steve's final thought -- that's what the courts are for. On that point, we agree.

This spring the state Supreme Court is scheduled to hear oral argument in a farming exemption case. The issue is whether, as a matter of law, the construction of a farm road that will use fill in making the road, is an exempt activity. It may not answer the question that arises in a timber harvest context, but it will likely shed some light on future exemption issues.

DEP defers to municipal agencies to determine whether these temporary roads are within the farming exemption. With 169 municipalities and the 50-50 split that DEP has found to exist

regarding municipal determinations on temporary roads for timber harvests, there is too much variation. I've concluded a previous article on the farming exemption with the notion that the wetlands act should be amended with clear language establishing the procedure and the activities that are exempt. An exemption provision that allows such seemingly contradictory results from town to town is irrational and not in the public interest. I continue to believe that an amended statute would benefit the agencies, the farming and timber producers and the public.

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