

Journey to the Legal Horizon

State Supreme Court Rules: Farm roads constructed with fill in wetlands not exempt from wetlands permit requirement

In a unanimous decision (6-0) released in August, the state Supreme Court ruled in *Taylor v. Conservation Commission*ⁱ, 302 Conn. 60 (2011), that roads constructed with fill in wetlands are not exempt from the state wetlands law -- thus, a wetlands permit is required. The Supreme Court believed it was addressing only those roads involving fill. I represented the plaintiff, Jim Taylor, in his appeal to the Superior Court after the Fairfield Conservation Commission denied his request for a determination of farming exemption. In that original agency decision, in the spring of 2006, the commission denied that his plan fell within the farming exemption. The trial court ruled in 2007 that the agency failed to make a determination on each of the proposed activities. The agency was required to rule activity-by-activity whether the farming exemption applied.

At that point, February 2008, the agency determined that everything he proposed fell within the farming exemption (removal of stones, construction of stone walls, a fence, a dug well, an addition to an existing barn, the planting of a nursery, fruit trees and flower, herb and vegetable beds and the maintenance of a grass swale, the construction of a one farm road in the upland) *except* two roads in the wetlands. I represented Jim Taylor in his second appeal to the Superior Court, this time narrowly focusing on the meaning of the farm road provision in the farming exemption. The trial court upheld the agency action. On appeal to the Supreme Court, I represented the Connecticut Farm Bureau Association, Inc., amicus curiae in the appeal.

To those of you who have not had to think much about the farming exemption or any exemption under the wetlands law, you might think that construction of any road involving fill in a wetland requires a wetlands permit. But consider this -- regulated activities, the ones which require a permit, are defined by *excluding* the activities in the statutory exemption. So, the discussion of an exemption must begin by examining the statute. The language for the farming exemption in Conn. Gen. Stat. § 22a-40 (a) (1) is not what I would call straightforward. The first sentence is clear: a number of activities are listed. Farming is one of them. (Other case lawⁱⁱ requires us to apply the definition of farming found in Conn. Gen. Stat. § 1-1(q), if the enabling legislation [the wetlands act] does not include a specific definition of farming. [It does not.]) But then you start to wonder, what about the farm road to get the equipment to the fields or the harvest out of the fields to the market? Is that road included? So, you proceed to the second sentence:

"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 . . ."

The second sentence tells you what's *not* in the exemption, in other words, what needs a permit. It does so with a double negative. *Could the legislature have drafted this second more clearly? Absolutely.*

Here is the conflict: "road construction directly related to the farming operation" vs. "filling of wetlands."

The Supreme Court resolves that tension with this one-sentence conclusion: "We conclude that, even if road construction directly related to the farming operation is permitted as of right, such road construction is not permitted as of right if it involves the filling of wetlands, because the filling of wetlands is not permitted as of right."ⁱⁱⁱ With the "even if" phrase, the Supreme Court informs us it hasn't decided that the road construction is permitted as of right. The Supreme Court focused on the "filling of wetlands" exclusion to the exemption. That is clear. The Supreme Court states: "It [the statutory exemption] plainly and unambiguously does not permit the filling of wetlands as of right."

But what is left of the "road construction" exemption? Hard to know. The Supreme Court stated in the text of the decision (quoted above) that it hasn't decided whether there is a road construction exemption. The Supreme Court restates that in footnote 10: "We emphasize that, because we conclude that filling in wetlands is not permitted as of right, we do not address the questions of whether road construction directly related to the farming operation is permitted as of right . . ."

The word "construct" means, according to the Random House Webster's College Dictionary, "to build or form by putting together parts." Those parts would constitute some kind of material, which in turn, would mean, that the construction of all roads involves "fill" of some sort. I'm hard-pressed to fathom what is left of the exemption for road construction directly related to the farming operation. Yet, the Supreme Court was unwilling to express any opinion on the meaning of or breadth of the construction of farm roads.

The Supreme Court notes that the wetlands staff memo mentions that floodplain soils can be sturdy enough to drive on. The genesis of this position is from Steve Tessitore, former DEP employee in the wetlands program. Such use of land, however, isn't the same as road construction. In that case, no road construction is necessary. But what about when road construction *is* necessary?

Back to the definition, how do you build a road without putting together parts . . . composed of materials . . . which constitute fill? The Supreme Court did not believe it needed to consider that possibility, thinking it only necessary to do so if Jim Taylor established that all roads require fill.^{iv}

When I read a case, I want to understand, looking back, what the court did, and looking forward, what the court will do. The Supreme Court reduced to black-and-white that Jim Taylor's farm

roads involving fill in the wetlands are not exempt and require a permit and looking forward, no fill of a farm road will fall within the exemption. But also looking forward, what farm roads can be constructed as an exempt activity remains gray. In my view, the Supreme Court missed an opportunity to *definitely* interpret "construction of roads directly related to the farming operation."

Looking back, I note that Jim Taylor initially filed his request for a determination of exemption in February 2006. Five-and-a-half years later he knows he needs to file for a permit without any guidance from the Supreme Court as to whether an exemption for constructing a farm road even exists.

Whenever I write about the farming exemption I end up with the same thought: don't the wetlands agency members and those seeking to farm deserve a straightforward statute that spells out what is exempt and what is not?

Janet P. Brooks practices law in East Berlin. You can read her blog at: www.ctwetlandslaw.com.

ⁱ This case can be read on the judicial website at: <http://www.jud.ct.gov/external/supapp/Cases/AROCr/cr302/302CR105.pdf>. You may search for it yourself on the judicial website (www.jud.ct.gov) by going to the archives of the Supreme Court, clicking on 2011, then scrolling down to "published in the Connecticut Law Journal - 8/16/11 and clicking on the *Taylor* case.

ⁱⁱ See *Johnson v. Board of Tax Review*, 160 Conn. 71, 75 (1970) ("To search for a definition beyond that in § 1-1 would require us to ignore the specific direction that 'agriculture' and 'farming' *shall* be defined as stated therein. To do so would be improper. Thus, we must apply the definitions prescribed by the legislature in § 1-1.")

ⁱⁱⁱ *Taylor v. Conservation Commission*ⁱⁱⁱ, 302 Conn. 60, 67 (2011).

^{iv} "(B)ecause the plaintiff has not demonstrated that all road construction on wetlands requires the use of fill, the plaintiff has not demonstrated that our interpretation of the statute renders the subject clause meaningless." *Taylor v. Conservation Commission*^{iv}, 302 Conn. 60, 67 n.8 (2011).