"Journey to the Legal Horizon"
Horses and the farming exemption

The Editor of "The Habitat" has asked me to address the following questions regarding horses and wetlands regulations. I previously addressed the agricultural exemption more generally in the Spring 2007 issue.

Is a single horse, kept in the back yard, next to a watercourse or wetland, exempt?

Yes. To begin, a wetlands agency does not have jurisdiction over exempt activities. That means no permit can be required. So, the inquiry is: does the activity (keeping of a horse) qualify as an exempt activity? The language of the statute, § 22a-40 (a) (1), exempts farming. The legislature enacted a definition of farming that applies to all laws unless a specific law provides a definition; the wetlands law does not provide its own definition. The general definition explicitly states that farming "shall include . . . the raising . . . feeding, caring for, training and management of livestock, including horses . . ." Connecticut General Statutes § 1-1 (q). If your agency has adopted the revisions to the 2006 DEP Model Regulations, § 1-1 (q) has been appended to your municipal regulations. It's handy to have the definition close to your regulations.

Answer: Yes, the keeping of a horse, whether in a wetland or not, is exempt.

If the horse owner wants to build a shed or small barn for the horse, within the upland review area, would a wetlands permit be required?

To be certain that a farming activity is exempt, we have to examine the second sentence of the exemption. The second sentence sets out activities that are excluded from the exemption and for which a permit will be required. I must say, it's not written in the most straightforward manner – the use of double negatives can be confusing:

> 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;

The second sentence directs us that the exemption doesn't include "the erection of buildings not directly related to the farming operation." What it *does* mean is that the erection of buildings directly related to the farming operation IS exempt. Could the legislature have written that more clearly? You bet!

Answer: No, the construction of a barn for the horse, as an exempt activity, does not require a wetlands permit.

Can the wetlands agency use a cease and desist order, or other legal action, to prevent runoff of pollutants from a horse paddock or corral?

To answer that question, we need to answer two questions: 1) what is your agency enforcing when it issues a cease and desist order? and 2) is the runoff of pollutants from a horse paddock exempt from the wetlands act?

A cease and desist order is used to stop a "person" (broadly defined) from violating the wetlands act. "If the inland wetlands agency or its duly authorized agent finds that any person is conducting or maintaining any activity, facility or condition which is in violation of [the wetlands act] or of the regulations of the inland wetlands agency, the agency or its duly authorized agent may issue a written order . . . to such person conducting such activity or maintaining such facility or condition to cease immediately such activity or to correct such facility or condition." § 22a-44 (a). The primary requirement under the wetlands act is to stop unpermitted activities: "(N)o regulated activity shall be conducted upon any inland wetland or watercourse without a permit." § 22a-42a (c) (1). The definition of "regulated activity" explicitly does not include exempt activities: " 'Regulated activity' means . . . *but shall not include the specified activities in section 22a-40."* § 22a-38 (13).

We now know that a cease and desist order can be used to stop a person from engaging in a regulated activity without a permit. An order can not be used to stop a person from undertaking exempt activities. The agency doesn't have the authority over the exempt activities – either to issue permits with conditions or to issue orders that prohibit activities which are exempt under the wetlands act.

I will assume that the pollution referred to is from animal waste. Can the waste be characterized as separate from the horse (which is undoubtedly exempt) to characterize the waste as a regulated activity? Only if the animal waste is a regulated activity can your agency require a permit for it or issue a cease and desist order against it. The common sense answer, of course, is that the waste and horse go together hoof in hoof. The legislature explicitly directed that the raising of horses constitutes farming. It further explicitly exempts farming from the reach of the wetlands act. The legislature knew that horses create wastes. The wetlands act could have been written to exclude horses by creating its own definition of farming. The legislature could have explicitly stated that the exemption "shall not be construed to include the waste products of animals. *The legislature did neither of those acts.* The conclusion to be drawn from what the legislature didn't do and what it did is that livestock, including their wastes, are exempt.

One trial court judge has issued a decision on this precise question. An agency issued a cease and desist order to a veterinarian who undertook activities on her property, preparing her land to keep horses. In Sackler v. Inland Wetlands Agency,[1] the court ruled that the preparation

[1] This case is not officially reported as are all decisions of the Connecticut Appellate Court and the Connecticut Supreme Court. In fact, the overwhelming majority of Superior Court (trial court) decisions are not officially reported. Many lawyers subscribe to legal research tools, such as Westlaw or Lexis, through which this case can be downloaded. For those of you eager to read the decision yourself, I recommend that you seek the aid of the very competent, enthusiastic and helpful law librarians at either the Connecticut State Library (http://www.cslib.org/) or the Connecticut Judicial Branch law libraries (http://www.jud.ct.gov/lawlib/aboutus.htm) which are located in most

of the land to create pasture and training lands to raise horses falls within the farming exemption. The trial court considered whether the waste product from horses was "filling of wetlands or watercourses" that is excluded from the exemption in Sentence Two (see above indented paragraph for the exact statutory wording). Judge Corradino states, in a very accessible style:

> The only remotely relevant evidence in the record is testimony that if horses were kept, they would have to be washed down and this might or would run into the wetlands as the proposed site is on a slope. Also, less delicately perhaps, horses are known to defecate and the runoff from the manure would seep into the wetlands. But if horse raising and training is permitted under subsection (1), which the court has concluded it is, these minor invasions of the wetlands or watercourses cannot invalidate the exemption or the whole exemption would be practically pointless unless the land bordering the wetland on which the activity occurs is completely flat or runs downslope from the wetlands – is that a common or realistic possibility given the location of wetlands and watercourses? . . . The runoff alluded to cannot be said to involve the 'filling' of wetlands or watercourses.

Trial court decisions bind the parties to that case. They can be of guidance, although not binding, on others. I believe this case is valuable as guidance.

Answer: No. A wetlands agency can not use a cease and desist order to prohibit the keeping of horses without a permit because of the potential or actual effect of horses' waste on wetlands or watercourses, as the keeping of horses and the creation of their waste products are exempt activities.

After reading this article are you still feeling you should be regulating agriculture or other exemptions? Here's what an exemption means. In spite of, regardless of, or despite adverse effect to a wetland or watercourse, the legislature has made a decision to remove that activity from your field of regulation. Your agency has neither the responsibility for, nor the authority over, exempt activities. It doesn't mean that there are no laws that address those activities. It just means that the wetlands act doesn't regulate those activities.

Janet P. Brooks

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of the state courthouses. The full citation for the case is: Sackler v. Inland Wetlands Agency, Superior Court, judicial district of New Haven, Docket No. CV 03 048 04 71, CV 03 048 17 05 (October 26, 2006).