

New Cranberry Farm Requires Wetland Permit

The Michigan Supreme Court has held that the farming activity exemption to the statutory wetland permit requirements is not so broad that it encompasses a landowner's proposed cranberry farm, and, because the operation did not fall within the production and harvesting draining exemption or the existing farming exemption, the landowner is required to obtain a wetland permit to proceed.

Wallace Huggett acquired a 325-acre parcel of land in Cheboygan County, Michigan (the Property) after he foreclosed a mortgage that had been assigned to him. All but 47 acres of the Property is classified as wetlands. After acquiring title, Huggett proposed to build a 200-acre cranberry farm on the Property. In order to create conditions conducive to growing cranberries, he proposed placing fill material in wetlands areas, excavating and removing soil from wetland areas, building dikes and culverts, digging irrigation ditches, and constructing a reservoir, pumping station, roads and an airstrip.

In 1990, the Michigan Department of Natural Resources (DNR) advised Huggett that he needed a wetland permit under Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act (Part 303) to proceed with the proposed cranberry farm. Upon applying for a permit later that year, the application was denied. Huggett then requested a contested case hearing under the Administrative Procedures Act, but after a year, the hearing never occurred. Huggett subsequently filed an action seeking a declaration that his proposed cranberry farm was not subject to the wetland permit requirements because it is an exempted farming activity.

After several hearings, a trial court held that Huggett's proposed cranberry farm was indeed a farming activity exempt from the wetland permit requirements under Part 303. So ruling, the court stated that the exemption "includes all activities necessary to commence and to continue farming in a commercially viable manner and to bring land into agricultural production." The DNR appealed.

Upon appeal, the Michigan Court of Appeals reversed the trial court on the exemption issue on the basis that the farming exemption was intended to apply to land already in use as a farm, and did not apply to new farming or agricultural activities. Therefore, because Huggett wanted to establish a new cranberry farm rather than continue an already existing one, the Appeals Court held that Huggett must obtain a wetlands permit.

Subsequently, the Michigan Supreme Court granted Huggett leave to appeal, limited to the issue of whether the Court of Appeals correctly interpreted the farming activities exemption.

Part 303 governs wetlands activities. Under Part 303, certain acts in wetlands are prohibited, such as filling, dredging, construction or development, and draining. However, Part 303 also provides that certain activities are not subject to these prohibitions, such as land that has been in use as a farm, along with activities necessary for maintenance and continued farming of the property, including agricultural irrigation and drainage or construction of farm ponds or roads. Part 303 also states:

An activity in a wetland that was effectively drained for farming before October 1, 1980 and that on and after October 1, 1980 has continued to be effectively drained as part of an ongoing farming operation is not subject to regulation under this part.

To determine whether the activities necessary to establish and operate Huggett's proposed cranberry farm are permissible uses exempt from the wetland permit requirements, the court examined the statutory language of Part 303. If the statutory language is clear and unequivocal, then the Court can conclude that the legislature intended the meaning exactly as written, and the statute will be enforced as written.

Huggett asserted that the activities necessary to establish and operate the proposed cranberry farm are not subject to the wetland permit requirements because the section that exempts farming activities provides a list of various types of farming activities that begins with the term "including." Huggett argues that by beginning the list with "including," the legislature intended that the listed activities would serve only as an example of the types of exempted farming activities. Therefore, Huggett reasoned that the farming activities exemption includes all of the activities necessary for operating a farm, and presumes that he can engage in all the activities necessary to establish and run his proposed cranberry farm without a wetland permit.

The Supreme Court disagreed, stating that when a statute uses a general term followed by specific examples included within the general term, as does the farming exemption, the principle of statutory construction applies in which the general words shall be construed as applying only to things of the same "kind, class, character, or nature as those specifically enumerated." Under this principle, the Supreme Court found that the general exemption for farming activities can include activities not specifically listed in

the farming exemption language, but the activities must be of the same kind, class, character or nature as the specific activities listed. The activities Huggett sought to exempt, however, are not in the kind, class, character or nature of operating a farm, the court ruled.

According to Part 303, without a permit, the following activities are prohibited in wetlands: “a) depositing or permitting the placing of fill material in a wetland; b) dredging, removing, or permitting the removal of soil or minerals from a wetland; c) constructing, operating, or maintaining any use or development in a wetland; or d) draining surface water from a wetland. However, under the same section of the statute, a permit is not required for “minor drainage.” Although the court found that this language may normally leave room for debate about whether drainage activities are “minor” or not, the court held that in this case there was no debate. Huggett’s proposed activities undeniably amount to more than minor drainage, and also include filling and dredging in a wetland, which are all prohibited. Therefore, the court found that Huggett’s proposed activities do not fit within the farming activities exemption.

Thus, the Supreme Court affirmed the Court of Appeals decision reversing the trial court’s findings that Huggett’s proposed activities were within the farming activities exemption.

Hugget v. Department of Natural Resources, 2001 WL 803971, July 17, 2001

S. Lee Johnson