



MEMORANDUM

**To:** Todd Penney, P.E., Town Engineer/Wetlands Agent  
**From:** Kenneth R. Slater, Jr., Esq.  
**Date:** November 17, 2021  
**Re:** Wetlands Act Agricultural exemption questions re: 777 Dunn Road app.  
Our File No. 17996.0072

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My responses to your questions regarding the 777 Dunn Road application that involves agricultural activities directly in a wetland are below. Please contact me if you of the Commission have follow-up questions.

**I. IF THE WETLAND DOES NOT HAVE CONTINUAL FLOW, WOULD THE APPLICANT BE ALLOWED TO CLEAR/FILL/GRADE IN THE WETLAND FOR THE HORSE ACTIVITIES AS-OF-RIGHT?**

Yes. The relevant provision of the wetlands act carves out certain activities from the otherwise as-of-right agricultural activities that can occur directly within wetlands and watercourses states:

The provisions of this subdivision [exempting agricultural activities in wetlands and watercourses as of right] 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....

General Statutes § 22a-40 (a)(1) (emphasis added).

Based on the *Indian Spring Land Co. v. Inland Wetlands*, 322 Conn. 17 (2016) decision discussed in more detailed below, each one of the clauses in that paragraph need to be read independently as if the word “or” was written between them. For that reason, by stating that filling of wetlands having continual flow does not fall within the agricultural exemption, the statute must be read to provide that the filling and related grading of the fill within wetlands that do not have continual flow is permitted by right if directly related to the agricultural use.

**II. IF THE WETLANDS HAS CONTINUAL FLOW, IS THE APPLICANT ENTITLED TO CLEAR THE TREES AND GRADE IN THE WETLAND PROVIDED FILL IS NOT PLACED IN THE WETLAND**

Based on the paragraph cited above, clearcutting is not permitted in the wetlands even if related to agricultural use unless it involves expansion of agricultural crop land. If the removal of trees does not involve clearcutting, it is permitted directly within the wetlands as would be grading activities directly related to the agricultural use provided that the grading does not result in the relocation of the wetland.

**III. DOES THE APPLICANT HAVE THE RIGHT TO CONSTRUCT A BARN IN THE WETLAND THAT INCLUDES THE PLACEMENT OF FILL IN AND AROUND THE BUILDING?**

Yes. While a decision of the Connecticut Appellate Court *Red 11, LLC v. Conservation Commission*, 117 Conn. App. 630, *cert. denied*, 294 Conn. 918, 984 A.2d 67 (2009) previously ruled that the construction of a road related to an agricultural use was not permitted if it involves filling of wetlands, the Connecticut Supreme Court reversed that decision in its 2016 decision in *Indian Spring Land Co. v. Inland Wetlands*, 322 Conn. 17 (2016). As discussed below, although that case involved a proposed road, the decision applies equally to building construction directly related to the farming operation.

As with the issues above relevant portion of the wetlands act states:

The provisions of this subdivision [exempting agricultural activities in wetlands and watercourses as of right] **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 topsoil, peat, sand, gravel or similar material from wetlands or watercourses for the purposes of sale....

General Statutes § 22a-40 (a)(1) (emphasis added).

The court stated that the phrase “road construction or the erection of buildings not directly related to the farming operation” is the basis of the dispute as to whether the agency had the authority to attach special conditions to its permit authorizing the plaintiff's access road. 322 Conn. at 12–13. The trial court, relying on the Appellate Court's *Red 11* decision, found that any road construction, whether related to agricultural uses or otherwise, is subject to the wetlands agency jurisdiction whenever it involves “filling or reclamation of wetlands or watercourses with continual flow.” The Supreme Court disagreed and determined that the phrase “road construction or erection of buildings not direct related to the farming operation” must be read as an independent clause so that any road or building directly related to the farming operation is completely outside of the jurisdiction of the agency when constructed in any wetland. As a result, if fill is required to construct the barn that will be related to an agricultural use, it can be placed in the wetlands as of right. If fill around the building is reasonably required as part of the construction of the barn such as fill related to the entrances of the barn, it would similarly be exempt. If the fill around the building is not reasonably related to the construction of a barn it would be subject to regulation unless falling into one of the other exemptions.