

02-15-0013 - V

**STATE OF MICHIGAN
90TH DISTRICT COURT, COUNTY OF CHARLEVOIX**

People of the State of Michigan
Plaintiff,

V

Case No. 03-262-SM

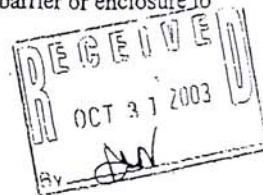
Robert E. Lee,
Defendants.

OPINION

The Defendant is charged with violation of the Wetlands Protection Act, M.C.L. 324.30304 for depositing fill in a wetland without first obtaining a permit. The Defendant claims that his construction of a pond for aquaculture and depositing the pond spoils around the pond in the wetlands is exempt under the following provisions:

1. M.C.L. 324.30305 Permissible uses which includes(e) farming and (g) Construction and maintenance of farm and stock ponds.
2. Michigan Aquaculture Development Act, M.C.L. 286.871.
3. Michigan Right to Farm Act, M.C.L. 286.471

The Defendant presented evidence that his property was registered by the Department of Agriculture as an Aquaculture Facility. M.C.L. 286.872(c) states that an "aquaculture facility" means a farm or farm operation engaged in any aspect of aquaculture in privately controlled waters capable of holding all life stages of aquaculture species with a barrier or enclosure to



prevent their escape into the waters of the state. M.C.L. 286.874(2) states that aquaculture facilities are considered to be a form of agriculture facilities and uses. M.C.L. 286.876 provides that a person shall not engage in aquaculture unless they obtain a registration from the Department of Agriculture. M.C.L. 286.879 (2)(a) provides that a registered facility must have procedures and barriers in place to prevent the escape of aquaculture species into waters of the state. The Department of Agriculture Administrative Rules, R291.303 , states that livestock includes (xii) Aquaculture.

M.C.L. 324.30305 states that the construction or maintenance of farm or stock ponds are allowed in a wetland without a permit. The Prosecutions position at trial was that this did not include fish ponds. This Court disagrees with the Prosecutions position. The Michigan Aquaculture Act clearly sets forth the states policy to treat aquaculture with all the rights privileges, and , responsibilities of all other agriculture facilities. The Department of Agriculture Administrative Rules includes in the definition of livestock cattle, sheep, swine, aquaculture, etc. Therefore, this Court cannot find that farm or stock ponds are limited to provide water to land based animals.

The next issue to consider is whether even if the pond itself is exempt from the permit requirement in a wetland, whether the placing of the ground removed from the pond area in the adjacent wetland, surrounding the pond, also falls within the exemption. The only testimony present to the Court was by Mr. Lee on this subject. He testified the mounding around the pond was required by the Aquaculture Act which requires a barrier to prevent the escape of fish from the pond into waters of the state. He also testified that the dry area around the pond was required for periodic cleaning of the pond by scraping the bottom of the pond and placing the spoils on

the berm to dry, and then replanting the pond. He also testified the solid ground berm area around the pond was necessary for harvesting the fish. Harvesting was accomplished by two vehicles dragging a net. One vehicle drives on each side of the pond dragging the net.

The Prosecution claims that the Defendant's operation is not exempt pursuant to *Huggett v. DNR*, 464 Mich. 711(2001). The Michigan Supreme Court found that the issue for the courts to determine is whether a farm operation is exempt from the permit requirement if the "activity is of the same kind, class, character, or nature as the specific activities that relate to operating a farm listed in this case either under M.C.L. 324.30305(2)(e) or (g). The Defendant claims he is exempt under the "harvesting for food exemption" since the berm is necessary for access to the pond for the harvesting of food.

The analysis used in *Huggett v. DNR*, supra, is to consider the prohibition and exemption of the Wetlands Act. *Huggett* states, pg. 9, "some of the activities allowed under Sec. 30305 overlap with the activities prohibited under Sec. 30304. In this case the provisions overlap which prohibit dredging and removing soil and placing soil in a wetland, with the construction of a farm or stock pond, and the harvesting for the production of food. Mr. Lee testified that the one of the berm purposes is for the driving of vehicles for the harvesting of food. Sec. 30305(i) also allows for the construction (filling of a wetlands) for a farm road provided it is constructed in a manner as to minimize any adverse affect on the wetlands.

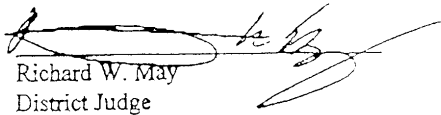
This is a criminal case in which the Defendant has raised the defense that the placing of the berm around the pond is required for the operation of an aquaculture facility to provide access for harvesting, cleaning the pond, and as a barrier to keep fish from escaping. No evidence was presented to refute this testimony or to establish that the size and extent of the

berm was more than, or greater than, necessary for the operation of a aquaculture farm pond. The operation of the pond in this case is distinguishable from the cranberry farm in Huggett. First, the pond is exempt under 30305(g). Part of the berm on the west side of the pond, toward the house was in an upland, and no testimony was presented that the placement of the berm in the wetlands area was not necessary for the operation of the pond , or was not constructed to minimize any adverse impact on the wetlands.

Criminal statutes are strictly construed. I could take the position that before a person fills a wetlands they must first obtain a permit to determine if the extent of the fill qualifies as a permissible use under M.C.L. 324.30305. That position is not consistent with the statute which allows specified filling or altering of a wetlands without first obtaining a permit under M.C.L. 324.30505(2)(e)(g)(i) and (j). Since this is a criminal case it is the prosecutor's responsibility to prove beyond a reasonable doubt that the defendant does not come within one of the exemptions of the statute once the defense puts forth credible evidence that an exemption applies. It is this Court's opinion that a farm or stock pond is clearly exempt which may include placing dirt removed from the pond around the water, even in a wetland, if the berm area is necessary to the operation of the farm pond. The Court cannot find on this record that the prosecution has proven beyond a reasonable doubt that the berm area was larger than necessary for the proper operation of a aquaculture facility.

IT IS HEREBY ORDERED, that a not guilty verdict is entered in this case.

Dated: 10/30/03


Richard W. May
District Judge