

WETLANDS POSE A TRAP FOR UNWARY DEVELOPERS

A little-known section of the Clean Water Act being used by environmentalists to preserve wetlands is creating surprises—and unexpected costs—for developers.

by Larry Schnapf

Low-lying marshes and swamps were once viewed as wastelands that were prime targets for development into industrial parks, shopping malls, and suburban subdivisions. Because these watery lands are now known to serve important ecological functions,¹ the federal Environmental Protection Agency (EPA) and private environmental organizations have begun to aggressively enforce a previously little-known section of the federal Clean Water Act (CWA)—33 USC § 1344—to prevent the destruction of wetlands. As a result, developers and landowners unaware of the wetlands regulatory requirements may find themselves saddled with land that has little or no value. In addition, landowners/developers who filled or drained wetlands without a permit may not only be required to restore the property to its predeveloped state, but may also find themselves subject to fines and criminal penalties—including imprisonment.

Federal regulation of wetlands is authorized under Section 404 of the CWA, which prohibits the discharge of dredged or fill materials into regulated waters of the United States unless authorized by a permit. The Section 404 permit program is one of the most complex and cumbersome regulatory programs established by any environmental law. The US Army Corps of Engineers (the Corps) has the primary responsibility for administering the 404 permit program but is required to consult with the US Fish and Wildlife Service (FWS) and the EPA. The FWS evaluates the impact proposed activity may have on the environment, and the EPA is responsible for promulgating the guidelines that the Corps must use in issuing 404 permits. The EPA is also responsible for enforcing violations of the 404 program and can veto the issuance of permits. A 404 permit cannot be issued unless the state in which the wetlands is located certifies that the activity will not violate state clean water standards.

The key threshold questions that a landowner or developer must ask are: (1) Are there wetlands

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on the property? and (2) Is the proposed development an activity subject to the jurisdiction of the 404 program? If so, the landowner/developer will have to apply for a permit before the project may commence. It is important to understand that the assertion of 404 jurisdiction by the Corps or EPA is not considered final agency action and thus not appealable to a federal court. It is not until the permit process has been completed (which can take two years) and the application has been denied that the assertion of 404 jurisdiction can be challenged.

Defining a Wetlands

The term *wetlands* does not appear in Section 404 nor is it defined by the CWA. Instead, the EPA and the Corps have included wetlands within the definition of "navigable waters" that are regulated under the CWA. Under 33 CFR § 323.2(a), navigable waters are defined as:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands";

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

- That are or could be used for interstate or foreign travelers for recreational or other purposes;
- From which fish or shellfish are or could be taken or sold in interstate or foreign commerce; or
- That are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in the first four items of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than

waters that are themselves wetlands) identified in items (a)-(f) of this definition.

The definition of wetlands adopted by the EPA and the Corps is extremely broad:

Those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Under this definition, areas that appear to be dry to the naked eye or that are wet only for a portion of the year, such as vernal pools or arroyos, may nevertheless be designated wetlands.² In 1985, the United States Supreme Court ruled in *United States v. Riverside Bayview Homes, Inc.*³ that the jurisdiction of the 404 program extended to isolated wetlands that were flooded by groundwater and not connected to "navigable water." Indeed, courts have ruled that wetlands artificially created by humans, such as impoundments and dams, are subject to the 404 program. [In August, the Bush Administration proposed a new definition for wetlands. See Sidebar on page 28 for details.]

National Wetlands Inventory Maps. Determining whether a particular tract of land contains wetlands is a difficult task because landowners or developers cannot rely either on the National Wetland Inventory (NWI) maps developed by the FWS or on maps developed by states purporting to show the location of wetlands. At best, these maps should only be used as a starting point for determining the approximate location of wetlands because the maps are notoriously unreliable and are not designed to reflect the definition of wetlands adopted under the CWA.⁴ Instead, each parcel of land must be evaluated on a case-by-case basis using the regulatory definition of wetlands contained in the *1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands*.

The federal wetlands manual distinguishes wetlands from nonwetlands on the basis of three parameters of criteria:

- Type of vegetation.
- Nature of the soil.
- Frequency of flooding of the property.

All three of these parameters must be present for

UPDATE: CHANGE IN WETLANDS DEFINITION PROPOSED

The federal government has come under intense pressure from developers, farmers, and the oil industry who allege that the regulatory definition of wetlands was too broad and that the three-parameter test contained in the 1989 wetlands manual is being applied improperly. Representatives of the regulated community have complained that regulators often found property to have wetlands when just one of the criteria was present. This frequently occurs in areas that are identified as having hydric soils even though the land has long since been effectively drained. As a result, more than 170 members of the House of Representatives sponsored legislation in late 1990 that would redefine wetlands and would grant landowners an automatic right to compensation for the fair market value of undevelopable wetlands. In addition, a congressional appropriations committee threatened to cut off the Corps' funding unless it reverted to the pre-1989 manual definition of wetlands when processing 404 Permit applications.

To stave off a legislation solution, in August the four federal agencies responsible for administering the wetlands program proposed a narrower regulatory definition of wetlands. The new definition would still use the parameter test but would change the procedures used for determining if property contained wetlands. At the time of this writing, it is uncertain when, and with what alterations, the final regulations would take effect.

There are two key changes under the proposed definition. First, to meet the hydrology parameter, land either must be inundated (flooding or ponding from surface water) for at least 15 consecutive days or saturated (wet conditions due to surface or groundwater) for at least 21 consecutive days during the growing season. Under the 1989 manual, an area only had to be saturated or inundated for seven consecutive days.

The second important change related to weight that should be placed on the presence of facultative plants when evaluating the vegetation criteria. Under the 1989 manual, regulators were required to determine the dominant plant species that was defined as more than 50% of all the plant life found at the site. If the dominant species was either obligate or facultative species, the land would be deemed a wetlands. The proposed rule replaces this approach with a mathematical formula in which each of the five classes of plants are assigned a

prevalence index value with obligates having a value of 1 and upland plants assigned a value of 5. The types of plants at the site are then measured as a percentage of the total population and these percentages are multiplied by the index value. A site that yields a prevalence index value below 3 will be considered a wetlands. Under this revised test, property that contains 100% facultative plants would score 3 and not qualify as a wetlands.

The EPA estimates that these changes will reduce the potential regulated wetlands from 200 million acres to between 100 and 150 million acres.

Two significant policy changes were also announced in addition to the definitional change. First, the sequencing rule, in which the Corps required landowners to show that they minimized or compensated for wetlands destruction before applying for a permit, will be limited to high-value wetlands. For less valuable wetlands, property owners may proceed with their permit applications as long as they offset wetlands loss through compensatory mitigation.

In addition, the preference for on-site mitigation will be phased out. Under this approach, landowners would be allowed to restore or create wetlands on different property to compensate for damage to wetlands on the regulated site. This would ease the burden of designing projects to avoid impacting wetlands. Along those lines, the Bush Administration announced it will examine the possibility of forming a market-based mitigation banking system in which property owners could accumulate, purchase, or perhaps trade mitigation credits for use in later projects. For example, a farmer may be able to purchase restored wetlands instead of replacing wetlands on a farm that were drained for planting.

Finally, the Administration announced a streamlined permit process in which permits will automatically be granted if the agency review extends beyond six months—unless an extension is granted for cause.

The federal effort to relax and streamline the wetlands process appears to be good news to developers but these changes could prompt states to develop their own wetlands criteria that are inconsistent with the relaxed federal standards. This has happened with other environmental regulations; developers will have to carefully review state wetlands requirements before proposing new projects.

the area to be identified as a wetland. First, there must be a prevalence of hydrophytic vegetation, which are plants that are able to live and reproduce in soil that is periodically saturated with water. Second, hydric soils that exhibit certain characteristics typical of wet conditions must be present. Finally, groundwater and other hydrologic factors must be studied to determine if the property is frequently flooded. This latter parameter is the most important of the three criteria to establish because the hydrologic conditions will fluctuate on a daily and seasonal basis.

Delineating Wetlands

If the NWI or state maps indicate that the property contains wetlands, an expert should be retained to conduct a survey so that the contours of the wetlands can be precisely described. Even if the NWI or state map indicates that there are no wetlands within the property boundary, a field survey should be conducted to confirm the absence of wetlands.

The survey will first attempt to identify the plant life found on the property. There are five classes of plant life that may be associated with wetlands:

- Obligate wetland plants that must live in saturated soil conditions are known as indicator species because they rarely exist outside a wetland area.
- Facultative hydrophytes, which exist in wetlands 67% to 99% of the time.
- Facultative plants are found in wetlands 34% to 66% of the time.
- Facultative upland plants are found in wetlands between 1% and 33% of the time.
- Upland plants are present in wetlands less than 1% of the time.

If there is a prevalence of obligate hydrophytes, there will be a 99% probability that the area is a wetland and no further analysis is generally required. If, however, the plants that are present are "facultative hydrophytes" that are "typically adapted" to saturated soil conditions, soil and hydrology characteristics must be analyzed.

Building a Case for Development. If the wetlands survey indicates that there are no wetlands on the development site, the application can proceed at the local level for preliminary site plan approval. If the survey reveals wetlands are on or near the site, a preapplication conference

should be arranged with the Corps and any other commenting state or federal agencies to familiarize the agencies with the project and to determine what modifications may be required.

Delineating the boundary of a wetlands is subjective and the presence of a single plant can shift a boundary one acre. As a result, the applicant's experts and the experts of the local government or party contesting the application for a wetlands permit will often hotly dispute the demarcation of the wetlands. Thus, it is critical that the attorney representing the applicant should not only be familiar with the wetlands survey prepared for the applicant but should also request and review the reports prepared by the opponents of the project before appearing at the administrative hearing.

It is also important to build a thorough administrative record *before* a decision is rendered. The applicant should besiege the agency making the decision with reports, expert opinions, and letters from local officials stating the benefits that the community will obtain from the project. Any letters from governmental bodies making factual allegations should be answered. By first building a complete administrative record, the applicant can then use this administrative record to challenge the decision of the agency in litigation.

Although the cost of a wetlands delineation may make some projects uneconomical, the technical data developed during this process may prove to be extremely useful to landowners because the Corps will often defer to the judgment of the applicant's consultant.

Regulated Activities

Once the presence of wetlands has been established, the next step in determining whether a permit is required is to ascertain if the project is an activity that is regulated by the 404 program. The statutory language of Section 404 confers regulatory authority over activities that result in a discharge of dredged or fill materials and will trigger the jurisdiction of the program. Landowners have attempted to challenge 404 jurisdiction by arguing their activities did not constitute a discharge of fill or dredged material. Courts have broadly construed Section 404, however, and disregarded the statutory language so that 404 jurisdiction may now extend to any activity that significantly changes the character of a wetlands.⁵ Under these liberal interpretations, re-

removal of trees and vegetation as part of a conversion to farmland as well as the mere draining of land have been held to be activities requiring a permit because these activities significantly impaired the wetlands' natural drainage characteristics.⁶ For example, United Foods Inc. of Bells TN, was recently fined \$125,000 and ordered to restore a wetlands area that it had attempted to drain in order to convert the land to croplands.⁷ Similarly, a developer of an office park outside of Philadelphia agreed to remove a road that had filled in wetlands and to create new wetlands after it was sued by a private sports club.⁸

In another case, the owner of a truck-repair business in Falls Township PA, who tried to expand his business by placing bricks and topsoil into a small stream that was not a navigable water, was sentenced to serve three years in jail and pay a fine of \$200,000.⁹ Other examples of activities that have been found to be violations of Section 404 include filling wetlands to build a parking lot and minnow ponds, and building a rock-and-fill jetty for a waterfowl enclosure.

Concern About Farmland. This trend of expanding the activities covered by Section 404 is of particular concern to developers who hold title to land that is currently being farmed. If the farmer drains or otherwise destroys wetlands without obtaining a permit, the developer, as owner of the land, may find itself subject to an enforcement action. For example, a Wall Street investor recently agreed to plead guilty to negligently filling in 300 acres of wetlands on a 3,000-acre preserve located on Maryland's eastern shore that was to be developed into a corporate retreat and private hunting preserve. The investor paid a fine of \$2 million and is required to restore the wetlands. In addition, the project manager also pleaded guilty and is facing fines and possible imprisonment.¹⁰

Exempt Activities and Nationwide Permits

If 404 jurisdiction exists, it is then necessary to determine if the proposed activity is one of the exempt activities listed in Section 404(f)(1). The activities exempted by this section include certain farming, silvicultural, and ranching activities; maintenance activities relating to dams, dikes, levees, and other similar structures; and construction or maintenance of farm irrigation or drainage ditches as well as farm or forest roads

or temporary roads for moving mining equipment, if such roads are built to minimize adverse effects on the environment.

If the statutory exemptions do not apply to the proposed activity, the next step is to ascertain whether it is sanctioned by the nationwide permits established by the Corps. These nationwide permits are actually 26 classes of activities that the Corps allow to be conducted throughout the US, provided the landowner complies with conditions such as a pre-activity notice, because they have minimal impacts on the environment.

The most commonly used is known as Nationwide Permit 26, which allows for filling of up to one acre of wetlands without notice, provided the wetlands are isolated or above the wetlands headwaters. This nationwide permit also allows filling of up to 10 acres, provided predischarge notification is given and the activity will only have a minimal effect on the integrity of the wetlands. In 1990, 40,000 actions that otherwise would have been subject to the wetlands regulator process fell into the Permit 26 category.

Section 404 Permit Procedure

If the proposed activity is not exempt from wetlands jurisdiction, the applicant will have to submit an individual permit application to the local Corps office. The application process under the 404 permit program can easily take at least two years, so developers are well-advised to determine if the proposed activity will fall within the purview of the 404 program before substantial financial resources are committed to a project. If the project will be regulated under the 404 program, it is essential that the EPA or the Corps is involved early in the planning stage so that the plans can be prepared to accommodate the requirements of the 404 program.

In taking action on a permit application, the Corps must apply the guidelines promulgated by the EPA. These so-called 404(b)(1) guidelines place onerous burdens on any proposed development. In general, the guidelines prohibit the issuance of a permit under four circumstances:

Alternative action exists. Discharge of dredged or fill material will not be allowed if a practicable alternative exists that would have a less adverse impact on the aquatic environment. For nonwater dependent activities (projects that can be on dry land, such as shopping malls), there is a rebuttable presumption that a practi-

cable alternative exists that will have a less adverse impact on the wetlands than the non-water dependent activities. In such cases, the applicant has the burden of clearly demonstrating that practicable alternatives do not exist. The guidelines also provide that practicable alternatives may include property not presently owned by the applicant that could reasonably be obtained, expanded, utilized, or managed to fulfill the basic purpose of the proposed activity.

The EPA measures the practicable alternative at the time the applicant purchased the property or proposed the activity, and not at the time the developer applied for a permit. This policy was the basis of the dispute in *Bersani v. United States Environmental Protection Agency*,¹¹ in which the EPA ruled that the applicant had failed to rebut the presumption of a practicable alternative because an alternative site had been available at the time the applicant had begun to search for a site. Subsequently, a rival developer had obtained an option to purchase the site, thereby making it unavailable. In upholding the EPA's decision, a federal court of appeals for the Second Circuit held that the purpose of the guidelines was to encourage developers to avoid choosing wetlands as development sites. The court said that this incentive would be removed if the developer only had to establish that there was no alternative available at the time when the application was made, rather than when the incentive was most needed, when a site was being selected.

Violation of state or federal water quality standards. An activity will also be precluded from receiving a permit if it would cause or contribute to a violation of federal or state water quality standards, toxic effluent standards, or statutes protecting marine sanctuaries.

Degradation of waters. A third restriction prohibits activities that will cause or contribute to significant degradation of the nation's waters. This generally involves assigning a value for the present condition of the wetlands, as well as an estimated value after the project or activity is completed, by evaluating a variety of functional factors. These include an evaluation of such things as wildlife habitat and sediment trapping.

Impact on aquatic ecosystem not considered. A permit cannot be obtained unless the applicant takes appropriate steps to minimize the potential adverse impact the discharge will have on the aquatic ecosystem. This requirement of

minimizing adverse impacts is one of the most critical factors in obtaining a 404 permit, and early planning and consultation with the EPA and the Corps is essential. Projects should be designed to preserve as much on-site wetlands as possible, because the more wetlands the project preserves, the fewer disagreements there will be with the Corps or the EPA.

For some projects, disturbance of wetlands will be unavoidable even after mitigation measures have been implemented. In those cases, the permit will allow the disturbance but require the creation, restoration, or enhancement of additional wetlands of ecological equivalence either on or off site in an amount equal to or greater than the surface area of the wetlands that is disturbed. Generally, the Corps favors enhancement of existing low-quality wetlands over the creation of artificial wetlands. This compensation for lost or disturbed wetlands is called mitigation, and is required to take place either before or concurrent with the permitted activities. Once again, it is a good idea to consult with the Corps and the EPA about proposed mitigation prior to submitting the application. Under the New Jersey Freshwater Wetlands Protection Act, for example, the applicant may also contribute money or donate wetlands to a Wetlands Mitigation Bank.

EPA Vetoes of 404 Permits

Even if the Corps issues a permit, Section 404(c) authorizes the EPA to veto the decision of the Corps if the agency determines after notice and opportunity that the discharge of materials will have an unacceptable adverse effect.

The 404(c) procedure begins when the regional administrator of the EPA notifies the Corps and the applicant that it may issue an unacceptable adverse effect ruling. If the applicant cannot satisfy the EPA within 15 days that no such effect will occur, the regional administrator must publish the proposed determination to veto the grant of the permit. Following the public comment period and an optional public hearing, the regional administrator must either withdraw the determination or submit the recommended rescission to the EPA administrator, who may either affirm, rescind, or modify the regional administrator's recommendation. For purposes of judicial review, the EPA administrator's decision is considered final agency review. The EPA has the burden of establishing the unacceptable adverse impact of the discharge.

Out of approximately 150,000 applications for 404 permits that have been processed by the Corps since 1979, the EPA has vetoed 11. In that time, only one EPA veto has been overturned by a court. In *James City County v. EPA*,¹² the agency vetoed the proposed construction of a dam on the grounds that practical alternatives were available that were less damaging to the environment. The EPA's action culminated a six-year permit process that included extensive environmental impact statements and alterations to the original plan to minimize the impact on high priority wetlands. After the EPA refused to withdraw its veto, the applicant filed suit.

In striking down the EPA's veto, the federal district court said that the alternatives cited by the EPA were themselves either impractical, illegal, or equally damaging to the environment. Because this was a water-dependent project, it is unclear what precedent this case will have for nonwater-dependent projects where there is a presumption of availability of less environmentally damaging alternatives.

Recommendations

To avoid the impact of Section 404, landowners and developers should consider the following strategies:

Conduct a wetlands audit prior to acquiring the property in the hope of avoiding property that has wetlands.

Try to build protection into the purchase agreement that provides that the obligation to buy is conditioned on obtaining a permit or representation that no wetlands exist on the property.

If the property does have wetlands, evaluate the financial risks associated with the property early in the design stage. It may be that the project can be designed in a way that will minimize the impact on wetlands by reducing the acreage of wetlands to be filled or dredged. This may allow the developer or landowner to be able to apply for a nationwide permit.

If these changes prove impractical, an alternative site should be selected to avoid triggering 404 jurisdiction. Developers should not rely on the willingness of title insurers to issue policies as a sign that the site does not involve wetlands because title insurers do not insure against governmental regulations.

If the property is already owned, the landowner should submit a wetlands jurisdictional determination to assert that there are no wetlands on the site that meet the regulatory definition of wetlands. Although this may be a relatively inexpensive process when compared to the 404 permit process, the government will vigorously challenge its authority.

If the permit is denied, the landowner should seek an administrative review of the permit denial. Such an effort will depend on a well-developed administrative record.

If the initial permit application is denied, the applicant can seek to reverse the permit denial or seek damages on the theory that the government's action amounted to a "regulatory taking" of private property. To bring such an action, a landowner must show that it exhausted all remedies and that the effect of the permit denial is preventing all economically viable uses of the property. The best cases for prevailing on such an action will be when the upland area is only a fraction of the property (10% to 20%), the property was acquired before the wetlands program was instituted, and the applicant offered to mitigate any loss of wetlands or somehow offset the environmental damage. ■

Notes

¹ Wetlands serve as temporary storage basins and act as buffers during storms to provide natural flood protection to coastal areas. Since they trap and collect silt, wetlands are also barriers to erosion and filter pollutants from water. In addition, wetlands provide critical breeding, nesting, and feeding habitats to a wide variety of birds, reptiles, and mammals and serve as spawning grounds for over 60% of the commercial fishery stock. Finally, wetlands act as recharge areas for groundwater supplies and are an important source of timber and other plant life.

² *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975).

³ 106 S. Ct. 455 (1985).

⁴ For example, New York only maps wetlands that are larger than 12.5 acres. Thus, an activity that does not trigger the New York Freshwater Act may nevertheless be subject to 404 jurisdiction.

⁵ *Save Our Community v. United States Emtl. Protection Agency*, 741 F. Supp. 605 (N.D. Tex. 1990); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 879 (5th Cir. 1983).

⁶ *United States v. Akers*, 785 F.2d 814 (9th Cir.).

⁷ EPA Administrative Order No. 404-90-08 (Feb. 15, 1990).

⁸ *West Chester Fish, Game and Wildlife Ass'n v. Oaklands Business Parks, Inc.*, No. 89-4409 (E.D. Pa. Feb. 27, 1990).

⁹ *United States v. Pozsgai*, No. 89-1640 (3d Cir. Jan. 12, 1990).

¹⁰ *United States v. Jones*, No. S-90-0216 (D. Md. May 25, 1990); *United States v. Ellen*, No. S-90-0215 (D. Md. May 25, 1990).

¹¹ 18 Emtl. L. Rep. (Emtl. L. Inst.) 20,875 (2d Cir. 1988).

¹² No. 89-156-NN (E.D. Va. Nov. 6, 1990).