



H.B. 231

124th General Assembly
(As Introduced)

Reps. Faber, Cates, Seitz, Calvert, Husted, Gilb, Hartnett, Raga, Schmidt, Lendrum

BILL SUMMARY

- Requires persons proposing to impact an isolated wetland to apply for and receive a permit for the proposed impact from the Director of Environmental Protection, and defines "isolated wetland."
- Requires persons applying for a permit for impacts to an isolated wetland to provide mitigation of the impacts through either donation of moneys to a wetlands mitigation bank or on-site mitigation.
- Requires the Director of Natural Resources to establish a list of approved wetland mitigation banks that may be used by applicants for permits, and defines "wetlands mitigation bank."
- Provides that high quality isolated wetlands are not governed by the bill, but instead are governed by other requirements established under the state Water Pollution Control Law and rules adopted under it, and defines "high quality isolated wetlands."

CONTENT AND OPERATION

Background

Until recently, all wetlands were regulated in Ohio under the federal Clean Water Act and rules adopted under the state Water Pollution Control Law that implement certain requirements established under the federal Act. The Clean Water Act, generally, requires persons that propose to impact a wetland to apply to the United States Army Corps of Engineers (Army Corps) for a permit under section 404 of that Act. The permit commonly is referred to as a "section 404 permit." Generally, a section 404 permit is required before a person may impact a wetland. In addition, the Clean Water Act requires persons to receive a water

quality certification under section 401 of the Act from the state that the impact to the wetland will not result in a violation of certain water quality standards. The receipt of the certification from Ohio is a precondition to the issuance of the section 404 permit issued by the Army Corps. This certification is commonly referred to as a section 401 water quality certification. The Ohio Environmental Protection Agency (OEPA) regulates wetlands pursuant to section 401 in accordance with rules adopted under the state Water Pollution Control Law.

A 2001 decision of the United States Supreme Court, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, calls into question the authority of the OEPA and the Army Corps to regulate all categories of wetlands under sections 401 and 404 of the Clean Water Act.¹ That case found that the authority granted to the Army Corps under section 404 of the Clean Water Act did not extend to nonnavigable, isolated, intrastate waters of the United States, which include certain categories of wetlands. Because of the Court's decision, the ability of the Army Corps and the OEPA to regulate isolated waters, including isolated wetlands, under sections 401 and 404 of the Clean Water Act is not clear. Apparently, isolated wetlands now fall under the exclusive jurisdiction of the states. The bill clarifies that the OEPA has permitting authority over impacts to isolated wetlands independent of the Clean Water Act.

Isolated wetland mitigation permit

The bill establishes requirements for the issuance of permits to persons proposing to impact isolated wetlands in the state. "Isolated wetland" is defined by the bill to mean an intrastate wetland that is not connected to navigable waters by a swale, stream, or other distinctive watercourse and that is not a navigable water under the federal Clean Water Act pursuant to the holding in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (sec. 6111.02(A)(3)).²

A person that seeks to fill, develop, or otherwise impact an isolated wetland must submit an application for an isolated wetland mitigation permit to the OEPA in lieu of complying with any other requirements of the state Water Pollution Control Law governing the waters of the state. The Director of Environmental

¹ 121 S. Ct. 675 (2001).

² A "wetland" is defined by the bill to mean an area that has hydric soils and is inundated or saturated by surface or ground water at a frequency and duration that is sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions. "Wetland" includes a marsh, bog, and other similar area.

Protection is required to prescribe the form of the application. The application must include the name and address of the applicant, a description of the isolated wetland that is proposed to be impacted, and a description of proposed mitigation for the wetland impact at a wetland mitigation bank or a description of proposed on-site mitigation (see, *Mitigation*, below). In addition, the application must be accompanied by a fee in an amount determined by the Director to be necessary to offset the cost of processing the application. (Sec. 6111.02(B).)

The bill requires the Director to approve or disapprove an application within 60 days of its receipt. If the Director does not act within 60 days, the application is deemed approved. The Director must issue a permit for an approved application for a proposed impact to an isolated wetland and corresponding mitigation for the impact. The permit must include the information that is included with the application along with any other terms or conditions pertaining to mitigation as determined by the Director. However, any terms and conditions cannot require a method of mitigation other than mitigation at a wetlands mitigation bank or on-site mitigation. (Sec. 6111.02(B).)

Mitigation

As stated above, persons applying for a permit under the bill must provide for mitigation of any proposed impacts to an isolated wetland. The bill establishes certain requirements related to the types of mitigation that are permissible for impacts to isolated wetlands. Mitigation may be conducted in two ways:

(1) The first method of mitigation is through the donation of moneys by an applicant to a wetlands mitigation bank. A "wetlands mitigation bank" is defined by the bill to be a site where wetlands have been restored, created, enhanced, or, in exceptional circumstances, preserved expressly for the purpose of providing compensatory mitigation for impacts to wetlands (sec. 6111.02(A)(5)). Mitigation for impacts to an isolated wetland must be conducted so that the total wetlands created, restored, enhanced, or preserved through the mitigation are created, restored, enhanced, or preserved at a rate of two times the size of the area of isolated wetland that is being impacted. (Sec. 6111.02(C)(1).)

The Director of Natural Resources is required to establish a list of approved wetland mitigation banks that must be used by applicants for permits under the bill and must submit the list to the Director of Environmental Protection. Approved wetland mitigation banks must support superior habitat or hydrological or recreational functions and must provide better ecological and hydrological functions than isolated wetlands replaced by mitigation. (Sec. 6111.02(D)(1).) In addition, the Director of Natural Resources must establish guidelines specifying appropriate limits on the amount of moneys that must be donated to a wetlands

mitigation bank for mitigation of impacts to isolated wetlands (sec. 6111.02(D)(2)).

(2) The second form of mitigation that is permitted under the bill and that may be conducted in lieu of a donation of moneys to a wetlands mitigation bank is on-site mitigation. An applicant for a permit may mitigate impacts to an isolated wetland through the creation, restoration, enhancement, or, in exceptional circumstances, preservation of wetlands at the site where the impact to the isolated wetland will occur. On-site mitigation for impacts to an isolated wetland must be conducted so that the total wetlands created, restored, enhanced, or preserved through compensatory mitigation are created, restored, enhanced, or preserved at a rate of two times the size of the area of isolated wetland that is being impacted. (Sec. 6111.02(C)(2).)

High quality isolated wetlands

The bill's provisions related to isolated wetlands do not apply to high quality isolated wetlands. High quality isolated wetlands must be governed by all other applicable requirements of the state Water Pollution Control Law and rules adopted under it. (Sec. 6111.02(E).) The bill defines "high quality isolated wetland" to mean an isolated wetland that has a high level of diversity of plant and animal species, a high proportion of native plant and animal species, and a high level of wetland functions. "High quality isolated wetland" includes isolated wetlands that contain or provide habitat for threatened or endangered species, forested wetlands that are of a high quality, vernal pools, bogs, and fens. (Sec. 6111.02(A)(5).)

HISTORY

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