



S.B. 135

124th General Assembly
(As Introduced)

Sen. Johnson

BILL SUMMARY

- Requires persons proposing the dredging or filling of wetlands to obtain coverage under a general state wetland permit issued by the Director of Environmental Protection or to obtain an individual state wetland permit from the Director.
- Establishes three different categories of wetlands of varying levels of ecological significance.
- Depending on the category and size of the wetland that is subject to dredging or filling, establishes different levels of review, different criteria for the approval or disapproval of a state wetland permit, and different compensatory mitigation requirements.
- Establishes public notice and participation requirements prior to the issuance or denial of individual state wetland permits.
- Requires the Director of Natural Resources in consultation with the Director of Environmental Protection to establish an approved list of wetland mitigation banks that may be used for compensatory mitigation purposes.
- Requires the Director of Environmental Protection to adopt rules that establish review procedures for applications for section 401 water quality certifications for impacts to waters of the state other than wetlands that are consistent with the review procedures established for applications for wetlands under the bill.
- Establishes application and impact fees for state wetland permits and section 401 water quality certifications.

- Declares an emergency.

TABLE OF CONTENTS

Background.....	2
Introduction.....	3
What is a wetland.....	3
Categories of wetlands.....	4
What is compensatory mitigation.....	4
State wetland permits.....	4
Levels of review, criteria, and mitigation.....	5
General state wetland permits and level one review requirements.....	6
Individual state wetland permits and level two review requirements.....	6
Individual state wetland permits and level three review requirements.....	8
Permit completeness review.....	10
Public participation requirements.....	10
Public participation and review for applications under level three review requirements.....	10
Other public participation and review requirements.....	11
Wetland mitigation banks.....	11
Rules pertaining to other waters of the state.....	11
Fees.....	12

CONTENT AND OPERATION

Background

Until recently, all activities governing the dredging and filling of waters of the state 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 dredge or fill waters of the state, including wetlands, 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 dredge or fill waters of the state, including wetlands. 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 dredging or filling 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 the dredging and filling of waters of the state, including 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 waters 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 for dredging and filling activities in all waters of the state, including wetlands, independent of the Clean Water Act.

Introduction

The bill establishes requirements for persons conducting dredging or filling of wetlands in the state and authorizes the Director of Environmental Protection to adopt rules governing dredge and fill impacts to waters of the state other than wetlands. Generally, a person that seeks to dredge or fill a wetland must obtain an individual state wetland permit or be covered by a general state wetland permit. Negative impacts to a wetland resulting from the dredging or filling of the wetland must be mitigated through conducting compensatory mitigation activities. The level of review for a permit, the criteria used to approve or disapprove a permit application, and the compensatory mitigation requirements for the dredging or filling of a wetland all depend on the size and category of wetland that is impacted. The bill establishes three different categories of wetlands: category 1, category 2, and category 3. A category 1 wetland is generally the lowest category of wetland whereas a category 3 wetland is the highest quality wetland. The bill also establishes public notice and participation requirements, fees, and requirements related to wetland mitigation banks.

What is a wetland

As stated above, the bill governs the issuance of permits for the dredging or filling of a wetland. The bill defines "wetlands" to mean those areas that are inundated or saturated by surface or ground water at a frequency and duration that

¹ 121 S. Ct. 675 (2001).

are sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. The term includes swamps, marshes, bogs, and similar areas that are delineated in accordance with the 1987 United States Army Corps of Engineers wetland delineation manual and any other procedures and requirements adopted by the Army Corps for delineating wetlands. (Sec. 6111.02(J).)

Categories of wetlands

The bill establishes three categories of wetlands: category 1, category 2, and category 3 wetlands. Generally, category 1 wetlands are less ecologically significant than category 2 and category 3 wetlands. The bill defines the different categories as those categories described in rules adopted under the Water Pollution Control law and as determined to be a category 1, category 2, or category 3 wetland, respectively, through application of the Ohio Environmental Protection Agency's "Rapid Assessment Method for Wetlands version 5.0" (ORAM). ORAM is a scoring system used by the Agency to determine into which category a given wetland fits. (Sec. 6111.02(A).)

What is compensatory mitigation

Persons that propose a dredging or filling of a wetland must provide compensation for any wetland loss that results from the dredging or filling. The term used in the bill to refer to that compensation is "compensatory mitigation." The bill defines it to mean the restoration, creation, enhancement, or, in exceptional circumstances, preservation of a wetland expressly for the purpose of compensating for wetland impacts (sec. 6111.02(B)). Compensatory mitigation must be conducted in accordance with certain ratios. Under the bill, if a person proposes to dredge or fill a wetland that is a category 1 or category 2 wetland, other than a forested category 1 or 2 wetland, the person must provide compensatory mitigation for the wetland loss at a ratio of 2 to 1. In other words, two acres of wetland must be created, restored, enhanced, or preserved for each acre impacted. Forested wetlands must be mitigated at a ratio of two and one-half to one. All other wetlands (category 3) must be mitigated in accordance with ratios established in rules adopted under the Water Pollution Control Law. In addition, the level of compensatory mitigation that is required for compensatory mitigation involving the enhancement or preservation of wetlands must be calculated in accordance with those rules. (Sec. 6111.027.)

State wetland permits

The bill establishes requirements for the issuance of general and individual state wetland permits. A person that proposes to engage in an activity that involves the dredging or filling of a wetland must apply to the Director of

Environmental Protection for coverage under a general state wetland permit or must apply for an individual state wetland permit in accordance with the bill (see below). The bill specifies that the issuance of a general or individual state wetland permit constitutes the issuance of a section 401 water quality certification (see above) for purposes of the Federal Water Pollution Control Act. Under the bill, no person may engage in the dredging or filling of a wetland unless authorized to do so by a general or individual state wetland permit. (Sec. 6111.021.)

The bill defines "dredging" to mean the removal or redistribution of any material within a wetland that changes the bottom elevation of the wetland (sec. 6111.02(C)). "Filling" is defined by the bill to mean the addition of fill material into a wetland for the purpose of creating upland or changing the bottom elevation of the wetland.² "Filling" includes the placement of fill material that is necessary for the construction of any structure; structures or impoundments requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection or reclamation devices such as riprap, groins, seawalls, breakwalls, and bulkheads and fills; beach nourishment; levees; sanitary landfills; fill material for structures such as sewage treatment facilities, intake and outtake pipes associated with power plants, and underwater utility lines; and artificial reefs. (Sec. 6111.02(E).)

Levels of review, criteria, and mitigation

Under the bill, the proposed dredging or filling of a wetland requires either coverage under a general permit or the issuance of an individual permit. Whether a given dredging or filling activity will involve a general or individual permit depends on the category of wetland that is impacted and its size. In addition, the bill establishes different levels of review, criteria for approval or disapproval, and compensatory mitigation requirements for a wetland based on its assigned category and its size.

² *The bill defines "fill material" to mean any material that is used to fill an aquatic area, to replace an aquatic area with dry land, or to change the bottom elevation of a wetland for any purpose. "Fill material" does not include: (1) material resulting from normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fiber, and forest products, or (2) material placed for the purpose of emergency reconstruction of recently damaged parts of serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures. (Sec. 6111.02(D).)*

General state wetland permits and level one review requirements

As discussed above, the bill establishes different levels of review for different sizes and categories of wetlands. The first level of review is applicable to category 1 and category 2 wetlands of ½ acre or less. The proposed dredging or filling of a category 1 or category 2 wetland of ½ acre or less is covered under the bill by a general state wetland permit and is subject to level one review requirements. (Sec. 6111.022(A).) Level one review requires the submission of a pre-activity notice that includes an application, a wetland delineation, a wetland categorization, a description of the project, a description of the acreage of the wetland that will be subject to dredging or filling, site photographs, and a compensatory mitigation proposal for the impact to the wetland (sec. 6111.022(B)).

Criteria for approval. Generally, a person that proposes the dredging or filling of a wetland that is subject to level one review may conduct the dredging or filling of the wetland automatically without the application of specific criteria. The person may conduct the dredging or filling not earlier than 30 days after submission of the pre-activity notice unless the Director of Environmental Protection notifies the applicant within that 30-day period that the dredging or filling of the wetland will result in a significant impact on state water quality. An applicant that receives such a notice may apply for an individual state wetland permit (see below). (Sec. 6111.022(C).)

Compensatory mitigation requirements under level one review. Required compensatory mitigation for the proposed dredging or filling of a wetland that is subject to level one review may be conducted at the discretion of the applicant and without the objection of the Director either on-site, at a wetland mitigation bank (see below) within the same United States Army Corps of Engineers district as the location of the proposed dredging or filling, or off-site within the same watershed as the wetland (sec. 6111.022(D)).³

Individual state wetland permits and level two review requirements

The next level of review is level two review, which is applicable to the proposed dredging or filling of a category 1 wetland of greater than ½ acre or the proposed dredging or filling of a category 2 wetland of greater than ½ acre, but less than or equal to three acres. The dredging or filling of such a wetland requires an individual state wetland permit issued by the Director to the person proposing to conduct the dredging or filling. (Sec. 6111.023(A).)

³ "On-site mitigation" has the same meaning as in rules adopted under the Water Pollution Control Law.

Level two review requires all of the following:

- (1) All of the information required to be submitted with a pre-activity notice under level one review (see above);
- (2) Identification of the source of the fill material to be used for the filling, if applicable;
- (3) Submission of an analysis of practicable on-site alternatives to the proposed dredging or filling that would have a less adverse impact on the wetland ecosystem; and
- (4) Submission of information indicating whether high quality waters, as defined in rules adopted under the Water Pollution Control Law, are to be avoided by the proposed dredging or filling of the wetland. (Sec. 6111.023(B).)

Criteria for the issuance or denial of a permit under level two review.

The Director must issue or deny an individual state wetland permit for the proposed dredging or filling of a wetland that is subject to level two review not later than 90 days after the receipt of an application for the permit. The Director must issue the permit unless he determines that the applicant has failed to demonstrate all of the following:

- (1) There is no practicable on-site alternative to the proposed dredging or filling of the wetland that would have a less adverse impact on the wetland ecosystem.
- (2) Reasonable buffers have been provided for any wetland that will be avoided at the site where the proposed dredging or filling will take place.
- (3) The wetland that will be subject to dredging or filling is not locally or regionally scarce within the subwatershed in which it is located, as subwatersheds are delineated in rules adopted under the Water Pollution Control Law, and does not contain rare, threatened, or endangered species.
- (4) The impact would not result in significant degradation to the aquatic ecosystem.
- (5) Appropriate compensatory mitigation has been proposed for any unavoidable impacts.
- (6) Storm water and water quality controls will be installed to ensure that peak post-development rates of surface water runoff from the impacted wetland do not exceed the peak pre-development rates of runoff from the on-site wetland. Water quality improvement measures must be incorporated into the design of the

storm water control measures to the maximum extent practicable; an example of these measures includes incorporating vegetated areas in a storm water control plan.

(7) Any additional, practicable, site-specific requirements that are determined necessary by the Director to protect water quality have been satisfied. (Sec. 6111.023(C).)

Compensatory mitigation requirements under level two review.

Compensatory mitigation for the proposed dredging or filling of a category 1 wetland that is subject to level two review may be conducted in the same manner as compensatory mitigation under a general permit (see above). Compensatory mitigation for the proposed dredging or filling of a category 2 wetland that is subject to level two review must occur in the following preferred order:

(1) First, practicable on-site mitigation. The bill defines "practicable" to mean available and capable of being executed with existing technology and without significant adverse effect on the economic feasibility of the project in light of the overall project purposes and in consideration of the relative environmental benefit (sec. 6111.02(H));

(2) Second, reasonably identifiable, available, and practicable off-site mitigation within the same watershed;

(3) Third, if the proposed dredging or filling will take place within a mitigation bank service area, within that mitigation bank service area. The bill defines "mitigation bank service area" to mean the designated area where a mitigation bank can reasonably be expected to provide appropriate compensation for impacts to wetlands and other aquatic resources and that is designated as such in accordance with the process established in the "Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (1995)" (sec. 6111.02(F)); and

(4) Fourth, if there is a significant ecological reason that the mitigation location should not be limited to the watershed in which the wetland is located and if the proposed mitigation will result in a substantially greater ecological benefit, in a watershed that is adjacent to the watershed in which the wetland is located. (Sec. 6111.023(D).)

Individual state wetland permits and level three review requirements

The final level of review, level three, is applicable to a proposed dredging or filling of a category 2 wetland of greater than three acres or a category 3

wetland. Such a dredging or filling requires an individual state wetland permit. (Sec. 6111.024(A).)

Level three review requires all of the following:

(1) All of the information required to be submitted with a pre-activity notice under level one review (see above);

(2) A full antidegradation review conducted in accordance with rules adopted under the state antidegradation statute; and

(3) The submission of information indicating whether high quality waters are to be avoided by the proposed dredging or filling of the wetland. (Sec. 6111.024(B).)

Criteria for the issuance or denial of a permit under level three review.

The Director must issue or deny an individual state wetland permit for the proposed dredging or filling of a wetland that is subject to level three review not later than 180 days after the receipt of an application for the permit. The Director must not issue the permit unless he determines that the applicant has demonstrated that the proposed dredging or filling will not prevent or interfere with the attainment or maintenance of applicable state water quality standards. The Director also may deny an application for such a permit if he determines that the proposed dredging or filling of the wetland will result in an adverse short-term or long-term impact on water quality. (Sec. 6111.024(C)(1) and (3).)

The bill authorizes the Director to impose terms and conditions on an individual state wetland permit that is subject to level three review requirements that are appropriate or necessary to ensure adequate protection of state water quality and to ensure compliance with the State Water Pollution Control Law and rules adopted under it. Prior to the issuance of such a permit or prior to, during, or after the dredging or filling of the wetland that is the subject of the permit, the Director may require that the applicant or permit holder perform various environmental quality tests, including chemical analyses of water, sediment, or fill material and bioassays, in order to ensure adequate protection of water quality. (Sec. 6111.024(C)(2) and (4).)

Compensatory mitigation requirements under level three review.

Compensatory mitigation for the proposed dredging or filling of a category 2 or a category 3 wetland that is subject to level three review must occur in the same preferred order as under level two review (see above) (sec. 6111.024(D)).

Permit completeness review

Within 15 business days after the receipt of an application for an individual state wetland permit, the Director must notify the applicant if the application is complete. If the application is not complete, the Director must include in the notice an itemized list of the information or materials that are necessary to complete the application. Time periods specified in the bill do not apply until the application is determined by the Director to be complete. If the applicant fails to provide information or materials that are necessary to complete the application within 60 days after the Director's receipt of the application, the Director may return the incomplete application to the applicant and take no further action on the application. (Sec. 6111.026(B).)

Public participation requirements

Except as discussed below, the Director must publish notice of the receipt of a complete application for an individual state wetland permit in a newspaper of general circulation in the county in which the proposed dredging or filling of the wetland that is the subject of the application is to take place. The Director must accept comments concerning the application and requests for a public hearing concerning it for not more than 14 days following the publication of notice concerning the application.

If a public hearing is requested during the 14-day period and the Director determines that there is significant public interest, the Director or the Director's representative must conduct a public hearing concerning the application. Notice of the public hearing must be published not later than 30 days prior to the date of the hearing in a newspaper of general circulation in the county in which the proposed dredging or filling of the wetland that is the subject of the application is to take place. If a public hearing is requested, the Director must accept comments concerning the application until five business days after the public hearing. A public hearing must take place not later than 70 days after the receipt of the application. (Sec. 6111.026(C).)

Public participation and review for applications under level three review requirements

Rather than being subject to the above requirements, applications for individual state wetland permits to which level three review requirements apply (category 2 wetlands of greater than three acres and category 3 wetlands; see above) are subject to rules adopted under the state antidegradation statute governing public notice and participation (sec. 6111.026(D)).

Other public participation and review requirements

When an application for a state wetland permit is changed, altered, or amended as a result of a public meeting, a second hearing is not required on the changed, altered, or amended application if the proposed dredging or filling that is proposed by the application has not changed or the scope of the proposed dredging or filling has been reduced from that proposed in the original application (sec. 6111.026(E)).

Wetland mitigation banks

Under the bill, the Director of Natural Resources in consultation with the Director of Environmental Protection must establish a list of approved wetland mitigation banks that must be used by applicants for state wetland permits for mitigation purposes and must submit the list to the Director of Environmental Protection (sec. 6111.025(A)). The bill defines "wetland mitigation bank" to mean 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 and that has been approved in accordance with the process established in the "Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (1995)" (sec. 6111.02(K)).

In establishing the list of approved wetland mitigation banks, the Director of Natural Resources must use the standards established by the federal mitigation bank review team process and must give preference to wetland mitigation banks that are comprised of areas involving the restoration of previously existing wetlands. In addition, the Director must apply uniform criteria in approving wetland mitigation banks and must not exclude state or local agencies from developing wetland mitigation banks. (Sec. 6111.025(A).)

The Department of Natural Resources, the Division of Wildlife in that Department, or any other division in that Department that is designated by the Director of Natural Resources may establish and operate a wetland mitigation bank for purposes of the bill. A wetland mitigation bank so established may be used by any individual or entity for mitigation purposes. (Sec. 6111.025(B).)

Rules pertaining to other waters of the state

Under the bill, the Director of Environmental Protection must adopt rules in accordance with the Administrative Procedure Act that establish review procedures for applications for section 401 water quality certifications for impacts to waters of the state other than wetlands that are consistent with the review procedures established for applications for wetlands under the bill (sec. 6111.028).

Fees

The bill establishes application and impact fees applicable to persons that apply for state wetland permits under the bill or section 401 water quality certifications under the Water Pollution Control Law. First, a person must pay an application fee of \$200 at the time of application (sec. 3745.113(A)). A person then must pay an impact fee according to the following schedule:

(1) If the subject of the application is a wetland, \$500 per acre of wetland to be impacted;

(2) If the subject of the application is a stream, \$1 per linear foot of the stream to be impacted;

(3) If the subject of the application is a lake, \$1 per linear foot of the lake to be impacted, calculated for both shoreline and in-water;

(4) If the application is for maintenance dredging, 10¢ per cubic yard to be dredged; and

(5) If the application is for in-stream mining, \$1 per cubic yard of the area to be mined.

The impact fee cannot exceed \$5,000 per application. In addition, if an application is denied, the Director must refund to the applicant one-half of the amount of the impact fee due by the applicant. (Sec. 3745.113(B).)

If a person conducts any activities for which a state wetland permit or a section 401 water quality certification is required without obtaining such a permit or certification, the person must pay twice the amount of the impact fee that the person otherwise would have been required to pay, not to exceed \$10,000 (sec. 3745.113(C)). All moneys collected from the fees must be deposited in the state treasury to the credit of the Dredge and Fill Fund created in the bill, which must be used by the Director of Environmental Protection to administer the bill and applicable rules (secs. 3745.113(D) and 6111.029).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	06-19-01	p. 674

s0135-i.124/kl

