



Members Only

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Regulation of Wetlands*

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Introduction

The term “wetland” often evokes unpleasant images of swampy, damp land filled with cattails, frogs, snakes, and mosquitoes. Throughout much of our nation’s history, wetlands were thought to be places to be avoided unless they could be put to productive use. Therefore, many wetlands were dredged and filled and then utilized for various purposes. In fact, it is estimated that in the past 200 years, the continental United States may have lost more than 50% of its wetlands, with Ohio losing more than 90% of its wetlands.¹

In more recent times, however, wetlands have been viewed as possessing intrinsic value that is worth preserving. This is evidenced by the 80% reduction in the average annual rate of wetland loss between the mid-1980s and mid-1990s.² Wetlands now are regarded as an essential source of food and habitat for waterfowl, fish, and mammals, including migratory birds. Wetlands also help to prevent flooding, replenish ground water supplies, and perform beneficial water purification functions. As a result, various federal laws, in particular the Clean Water Act, have been enacted to protect wetlands. Generally, regulatory authority over wetlands in the Clean Water Act is granted to the United States Army Corps of Engineers (Corps), the United States Environmental Protection Agency (USEPA), and the states. This brief will discuss the major provisions of the Clean Water Act that are pertinent to the protection of wetlands and Ohio’s role in wetland protection, including the state’s response to a recent United States Supreme Court decision affecting wetlands.

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If an area of land is determined to be a wetland, any development or other activities impacting that wetland likely will require permits.

Three federally-established diagnostic environmental characteristics—vegetation, soil, and hydrology—are used to determine whether an area of land will be classified as a wetland.

What is a wetland?

To determine whether a given area of land is subject to regulation as a wetland, it must first be determined whether that area meets the regulatory definition of a wetland. For regulatory purposes, wetlands are defined as “areas that are inundated or saturated by surface or ground water 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.”³

Government agencies that are responsible for wetlands regulation determine if an area of land is a wetland under this definition by applying specific criteria to each area of land on which development or other land-disturbing activity is proposed. The criteria that are used to determine what is and what is not a wetland are set forth generally in the United States Army Corps of Engineers 1987 Wetlands Delineation Manual (Manual). The Manual specifies three diagnostic environmental characteristics—vegetation, soil, and hydrology—that are used to determine whether an area of land will be classified as a wetland.

First, the Manual specifies that wetland vegetation—plant species capable of living in saturated soils—must be prevalent and recur seasonally. The second characteristic requires the land to contain hydric soil, a soil that is formed under conditions of

saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions that promote the growth of wetland vegetation. The final and essential characteristic, wetland hydrology, refers to areas in which the presence of water has an overriding influence and in which the land is inundated permanently or periodically or saturated to the surface during some point of the growing season.

If, upon application of the diagnostic criteria detailed in the Manual, an area of land is determined to be a wetland, any development or other activities impacting that wetland likely will require permits as discussed below.

Section 404 of the Clean Water Act: the section 404 permit

Section 404 of the Clean Water Act,⁴ administered by the United States Army Corps of Engineers, requires the implementation of a program to regulate the discharge of dredged and fill material⁵ into the waters of the United States, including wetlands. Therefore, if a person seeks to discharge dredged or fill material into a wetland area, the person may do so only if the Corps issues a permit for the activity. The discharge of dredged or fill material into a wetland often results from construction activities that transform a wetland into an upland. In general, a section 404 permit cannot be issued



if a practicable alternative exists that is less damaging to the wetland environment or if there would be a significant degradation of the nation's waters. Thus, when a person applies for a permit, that person must demonstrate that he or she has taken steps to avoid wetland impacts where applicable, minimized potential impacts to wetlands, and provided compensation for any remaining unavoidable impact through activities to restore or create wetlands.

General permits and individual permits

Under section 404, the Corps may issue either a general or an individual permit. A general permit is issued on a state, regional, or nationwide basis. General permits may be issued by the Corps for any categories of activities if it determines that the activities in the categories are "similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment."⁶ Many of the most common general permits are issued on a nationwide basis and thus are referred to as "nationwide permits." If a person qualifies for coverage under a nationwide permit, the procedures for approval of the activity are more streamlined and not as extensive as those that are required prior to the issuance or denial of an individual permit.

If a given activity will have an impact on a wetland area and is not

covered by a general permit, the person proposing the activity must receive an individual permit from the Corps prior to conducting the activity. Regulations adopted by the Corps establish specific procedures that must be completed prior to the issuance or denial of an individual permit. The Corps must first issue public notice of the permit application within 15 days of receiving all permit information. The public notice must describe the permit application, including the proposed activity, its location, and its potential environmental impacts. Additional steps include a public comment period of 15 to 30 days, a public hearing if requested, an evaluation by the Corps of the requested permit based on comments received and its own expertise, and preparation of a Statement of Finding that describes how the permit decision was made and that is made available to the public.⁷

Activities exempt from section 404 permit requirement

Section 404 exempts certain activities from the requirement to obtain a permit. Exempted activities, or nonprohibited discharge, include "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." In addition, section 404 exempts the "construction or maintenance of farm or stock ponds or

Under section 404 of the federal Clean Water Act, the United States Army Corps of Engineers may issue either a general or an individual permit to a person who seeks to discharge dredged or fill material into a wetland.



In order to obtain a section 404 permit, a person first must comply with the state's wetlands requirements and receive a section 401 water quality certification from the state to that effect.

irrigation ditches, or the maintenance of drainage ditches”; maintenance, including emergency reconstruction, of “dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures”; “construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters”; and other similar, specified activities.⁸

Role of the United States Environmental Protection Agency

Section 404(c) of the Clean Water Act authorizes the Administrator of the USEPA to restrict or prohibit the use of an area as a disposal site for dredged or fill material if the discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, or wildlife or recreational areas. Thus, this provision essentially authorizes the USEPA to veto a permit action undertaken by the Corps concerning an activity that will impact a wetland area. However, the veto power granted to USEPA has been utilized infrequently, fewer than 20 times in over 150,000 permit applications.⁹

State wetland protection under section 401 of the Clean Water Act

Receipt of a section 401 water quality certification from the state

is one of the conditions necessary to receive a section 404 permit. Therefore, a person cannot receive a section 404 permit unless the state first issues a section 401 water quality certification. In Ohio, that certification is issued by the Ohio Environmental Protection Agency (OEPA).

Pursuant to the Clean Water Act, an applicant for a federal license or permit for an activity that may result in a discharge into navigable waters, including wetlands, must receive a certification from the state in which the discharge would originate. That certification thus is needed by an applicant for a section 404 permit. It must confirm that the proposed activity that would cause the discharge will comply with state water quality standards as well as applicable Clean Water Act provisions. A certification issued under section 401 must specify “any effluent limitations and other limitations, and monitoring requirements” that are necessary to ensure that the applicant for the section 404 permit will comply with any applicable effluent limitations and other limitations established in the Clean Water Act and with any other appropriate requirements of state law specified in the certification. Any additional state requirements become conditions on the section 404 permit issued by the Army Corps of Engineers.¹⁰

The OEPA requires persons seeking to obtain a section 401 water quality certification to comply with state requirements pertaining to wetlands. Many of those require-



ments are found in rules adopted pursuant to Ohio's antidegradation statute and include procedures for identifying different categories of wetlands based on quality and requirements pertaining to wetland avoidance, minimization, and compensatory mitigation.¹¹ Thus, persons seeking federal approval of a wetland impact that is covered by section 404 also must comply with Ohio's wetland requirements established in rules.

The SWANCC decision and federal jurisdiction over wetlands

In January 2001, the United States Supreme Court issued a decision in the case of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*¹² (SWANCC) that affects wetlands regulation under the Clean Water Act. In that case, a group of municipalities selected an abandoned sand and gravel pit with excavation trenches to become a solid waste disposal site. The site, however, had evolved into permanent and seasonal ponds. Though the water-filled pit was not connected with any interstate waters, it served as a habitat for migratory birds. The municipalities applied for a permit from the Army Corps of Engineers, but the request was denied. The Corps asserted jurisdiction based on regulations adopted under the Clean Water Act that extended the scope of the Act to cover intrastate

waters that, among other things, provide habitat for migratory birds that cross state lines.

The SWANCC decision addressed the breadth of the Clean Water Act definition of "navigable waters" as "the waters of the United States, including the territorial seas."¹³ The Court held that the jurisdiction of the Corps did not extend to nonnavigable, isolated, intrastate waters, such as the gravel pit in the case, because the Clean Water Act expressly limited such jurisdiction to navigable waters.¹⁴

The impact of this case is that certain isolated wetlands likely will not be subject to jurisdiction under the Clean Water Act and therefore will not require a section 404 permit.¹⁵ Such wetlands, however, may still be regulated by the states.

Ohio's response to the SWANCC decision

The Ohio General Assembly reacted to the Supreme Court's SWANCC decision by enacting permit requirements for impacts to isolated wetlands.¹⁶ These requirements, effective July 17, 2001, grant the OEPA permitting authority for filling activities in isolated wetlands that is independent of the Clean Water Act. Therefore, a person planning to engage in activities that involve the filling of an isolated wetland must apply to the director of the OEPA for either a general or an individual state isolated wetland permit.¹⁷ An isolated wetland is defined in state

As a result of a 2001 United States Supreme Court decision, certain isolated wetlands likely will not be subject to jurisdiction under the Clean Water Act and will not require a section 404 permit; however, they may still be regulated by the states.



In response to the SWANCC decision, the General Assembly created a state isolated wetlands permitting program that establishes three categories of wetlands and different levels of review, criteria for approval or disapproval of a state permit, and mitigation requirements depending on the category and size of an isolated wetland.

law as “a wetland that is not subject to regulation under the Federal Water Pollution Control Act.”¹⁸

The law establishes three categories of wetlands of varying levels of ecological significance. Generally, category 1 wetlands are less ecologically significant than category 2 and category 3 wetlands. It then establishes different levels of review, different criteria for the approval or disapproval of a state isolated wetland permit, and different mitigation requirements depending on the category and size of an isolated wetland that is subject to filling. A proposed filling of a category 1 or a category 2 isolated wetland of one-half acre or less requires coverage under a general state permit; a proposed filling of a category 1 or a category 2 isolated wetland of more than one-half acre or a category 3 isolated wetland requires an individual state permit. As the ecological significance of a wetland

increases, so do the level of review for, and the stringency of the criteria for the approval of, a permit.¹⁹

Any negative impacts to an isolated wetland that are caused by filling the wetland must be mitigated.²⁰ Mitigation ratios are established in either statute or OEPA rule depending on the category of wetland. The ratios specify how many acres of isolated wetlands must be restored or created for each acre that is being impacted.²¹

Two other provisions of the state isolated wetlands program warrant a brief discussion. First, state law specifies that the discharge of dredged material into isolated wetlands is subject to the requirements discussed above.²² Second, issuance of a general or individual state isolated wetland permit constitutes the issuance of a section 401 water quality certification.²³ 

Endnotes

¹ America’s Wetlands: Our Vital Link Between Land and Water, available at <http://www.epa.gov/owow/wetlands/vital/toc.html>.

² Dahl, T.E. 2000. Status and trends of wetlands in the conterminous United States 1986 to 1997. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C.

³ 33 C.F.R. 328.3(b).

⁴ 33 U.S.C. 1344.

⁵ Dredged material is “material that is excavated or dredged from waters of the United States.” Fill material is defined as “material placed in waters of the United States where the material has the effect of . . . (r)eplacing any portion of a water of the United States with dry land . . . or . . . (c)hanging the bottom elevation of any portion of a water of the United States.” 33 C.F.R. 323.2.

⁶ 33 U.S.C. 1344(e)(1).

⁷ United States Environmental Protection Agency Fact Sheet, Section 404 of the Clean Water Act: An Overview, available at <http://www.epa.gov/owow/wetlands/facts/fact10.html>.



⁸ 33 U.S.C. 1344(f).

⁹ United States Environmental Protection Agency Fact Sheet, EPA's Clean Water Act Section 404(c): Veto Authority, available at <http://www.epa.gov/owow/wetlands/facts/fact14.html>.

¹⁰ 33 U.S.C. 1341(d).

¹¹ O.A.C. Chapter 3745-1.

¹² 531 U.S. 159 (2001).

¹³ 33 U.S.C. 1362(7). The Corps adopted regulations that define "waters of the United States" to include "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 could affect interstate or foreign commerce. . . ." 33 C.F.R. 328.3(a)(3). In contrast, O.R.C. 6111.01(H) defines "waters of the state" to mean "all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters."

¹⁴ In an earlier case, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court held that the Corps' jurisdiction under section 404(a) of the Clean Water Act extended to wetlands that actually abut a navigable waterway.

¹⁵ Two bills were introduced in the United States Senate and House of Representatives on July 24, 2002, to restore the protection of all waters and wetlands in place prior to the SWANCC decision. (S.2780 and H.R.5194.)

¹⁶ Sub. H.B. 231 of the 124th General Assembly. The requirements can be found in O.R.C. Chapter 6111.

¹⁷ O.R.C. 6111.021.

¹⁸ O.R.C. 6111.02(F).

¹⁹ O.R.C. 6111.02(A), 6111.022, 6111.023, and 6111.024.

²⁰ "Mitigation" means the "restoration, creation, enhancement, or, in exceptional circumstances, preservation of wetlands expressly for the purpose of compensating for wetland impacts." O.R.C. 6111.02(G).

²¹ O.R.C. 6111.027 and O.A.C. 3745-1-54.

²² O.R.C. 6111.028.

²³ O.R.C. 6111.021(C).

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