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"Streamlined" Permits, Migratory Birds and Draining Ditches: Recent Developments Confirm Need to Amend Statutory Wetlands Protection

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"STREAMLINED" PERMITS, MIGRATORY BIRDS AND DRAINING DITCHES

RECENT DEVELOPMENTS CONFIRM NEED TO AMEND STATUTORY WETLANDS PROTECTION

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On some level, it is appropriate that federal law and regulations governing wetlands, like wetlands themselves, are dynamic and ever-changing.This article will address three recent developments in the law and regulation of wetlands important to those interested in coastal and wetlands issues: (1) recent changes to the general permit program (specifying activities and parameters for "streamlined" permit processing) which replaces Nationwide Permit 26 with new and modified general permits; (2) an important case that the United States Supreme Court will be hearing in the upcoming 2000-2001 term, to decide whether "isolated" wetlands may be regulated by the federal government if such wetlands might be used by migratory birds; and (3) a federal administrative proposal to revise the definition of "discharge of dredged material" in such a way as to limit potential impacts to wetlands, following a 1998 D.C. Circuit decision that has resulted in the draining of more than 30,000 acres of wetlands nationwide.

This article also briefly examines these developments for what they teach us generally about the current state of federal wetlands protection, and the direction federal laws and regulations governing wetlands are taking. In brief, while the statutory language would benefit from substantial amendment, the stakeholders appear too entrenched in their relative positions to make meaningful reform possible in the near future. The piecemeal changes to wetlands law through the regulatory and litigation arenas will thus continue, benefiting lawyers and advocates more than those whom wetlands law and regulations actually impact. The article begins with a brief overview of those.

OVERVIEW OF THE FEDERAL WETLANDS REGULATORY SCHEME

In order to be regulated by the federal government, "wetlands" must meet a two-part test. They must:

(1) meet certain physical characteristics, and

(2) fall within the federal regulatory jurisdiction of the Clean Water Act (CWA).

Congress designated the United States Army Corps of Engineers (Corps) as the lead agency with respect to wetlands regulation, providing the U.S. Environmental Protection Agency (EPA) an oversight role.

With respect to the physical characteristic portion of the test, the Corps defines "wetlands" as "those 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." In other words, in order to be regulated, wetlands must meet certain parameters for three characteristics:

(1) hydrology; (2) soil; and (3) vegetation.

Although the U.S. Fish and Wildlife Service (FWS) maintains a National Wetlands Inventory, decisions about whether specific sites meet the characteristics are usually made through individual site delineations. With respect to the jurisdictional portion of the test, the Corps claims jurisdiction as far as the Commerce Clause of the United States Constitution will allow pursuant to section 404 of the Clean Water Act and subsequent interpretations of that Act. This means that the Corps will regulate waters "currently used, or . . . used in the past, or [which] may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."

Provided that these physical characteristics and jurisdictional thresholds are met, then generally anyone wishing to discharge dredged or fill materials into a wetlands must have a permit from the U.S. Army Corps of Engineers. Note that there are no exceptions for activities that are beneficial to the wetlands: all discharges require permits. The permitting process requires that an application be submitted to one of 41 Corps district offices. Such applications are governed by the regulations, guidance documents, and judicial interpretations in place at the time of application.

NEW NATIONWIDE PERMITS—CHANGES TO WHICH ACTIVITIES ARE ALLOWED TO PROCEED THROUGH A "STREAMLINED" PERMITTING PROCESS

Because every activity involving discharge of dredged or fill material into jurisdictional waters of the United States requires a Corps permit, the Corps processes tens of thousands of permits every year. In order to handle that enormous volume of work, Congress authorized a system of "general permitting" under section 404(e) of the Clean Water Act. General permits can be issued for activities that "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." Theoretically, if a general permit applies to an activity, the permittee can proceed quickly through the regulatory approval process, skipping certain steps such as analyzing practicable alternatives to the proposed action, and seeking public comment on the proposal. As required by the statute, the Corps has issued and reissued a set of nationwide general permits (NWPs) every five years. These nationwide permits cover such activities as discharges associated with road crossings, single family housing, etc. A number of general conditions apply to all NWPs, and state water quality certifications and coastal zone program consistency determinations are required for each permit.

One particular general permit, NWP 26, became the subject of significant controversy. This permit provided for streamlined permits for many discharges into "isolated" and headwaters wetlands. In December 1996 the Corps announced its intent to replace NWP 26 within two years. In part because of the complexity of the undertaking, combined with the active role that the various stakeholders in the debate took in the modification process, it took more than three years for the Corps to issue the promised replacement permits.

So, in June 2000, a new set of nationwide general permits replacing NWP 26 took effect. These new permits made significant changes to those activities in jurisdictional waters of the United States that can proceed without full regulatory review. In a Corps' background document describing the new permits, the Corps indicates that the new permits "continue a Corps of Engineers trend of enhancing the protection of the aquatic environment through the NWP program." The Corps acknowledged that the most recent changes will require an increase in Corps funding and "will increase costs to applicants to some degree. . ." but noted, in its press release announcing the changes, that the costs were less than would have been incurred in the original proposal.

The changes in the NWP program resulting from the new and modified NWPs include:

- replacing blanket authorization of activities in headwaters and isolated wetlands with specific authorizations of certain categories of activities, such as residential, commercial, and institutional development activities, as well as mining and agriculture activities;
- decreasing acreage caps on projects in wetlands allowed to proceed under the streamlined process (down from the 1996 limit of 3 acres, and the pre-1996 limit of 10 acres), with many caps as low as 1/2 acre;
- prohibiting all permanent above-grade fills in the 100-year floodplain below the headwaters of any stream for NWPs;
- prohibiting permanent above-grade fills within the regulatory "floodway" above headwaters, and requiring any above-grade fill in the "flood fringe" to meet standards set by the Federal Emergency Management Agency (FEMA);
- prohibiting use of NWPs in "critical resource" waters such as state natural heritage sites and state-designated outstanding natural resource waters;
- instituting a 300 linear foot limit for filling and excavating in stream beds for development, agriculture and mining activities;
- lowering to 1/10 of an acre the threshold for "preconstruction notification" (PCN) that must be given to the Corps before a project may be undertaken; and
- lengthening the PCN review period to 45 days.

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The new NWPs that were issued to replace NWP 26 are:

- NWP 39, *Residential, Commercial, and Institutional Developments*, which authorizes building pads, building foundations, and attendant features. NWP 39 has a maximum limit of 1/2 acre or 300 linear-feet of streambed, and requires a PCN at 1/10 acre;
- NWP 40, *Agricultural Activities*, which authorizes discharges for increasing agricultural production, relocation of existing drainage ditches in non-tidal streams, and building pads for farm buildings. NWP 40 has a maximum limit of 1/2 acre or 300 linear feet of streambed, and requires a PCN for all farm buildings, and other agricultural impacts more than 1/10 acre, (if such activities not reviewed by Natural Resources Conservation Service of the Department of Agriculture);
- NWP 41, *Reshaping Existing Drainage Ditches*, which authorizes modification of cross-sections of currently serviceable drainage ditches, but does not authorize increasing drainage capacity or relocating ditches. NWP 41 limits the activities to the "minimum necessary" and requires a PCN if material is sidecast into waters of the U.S., and where the project reshapes more than 500 linear-feet of drainage ditch;
- NWP 42, *Recreational Facilities*, which authorizes trails, campgrounds, environmentally designed golf courses, and other facilities integrated into the natural landscape without substantial filling. NWP 42 has a limit of 1/2 acre or 300 linear feet of streambed, and requires a PCN for impacts in excess of 1/10th acre;
- NWP 43, *Stormwater Management Facilities*, which authorizes construction or maintenance of stormwater facilities, except for new construction in perennial streams. NWP 43 has a limit of 1/2 acre or 300 linear feet of streambed, and requires a PCN for impacts in excess of 1/10th acre; and
- NWP 44, *Mining Activities*, which authorizes certain aggregate and hard rock mineral mining activities. NWP 44 has a limit of 1/2 acre, and requires a PCN for all activities under that permit.

In addition to the new NWPs, certain existing NWPs were modified to include certain activities formerly covered by NWP26. The modified NWPs are:

- NWP 3, *Maintenance* (adds authorization for the removal of accumulated sediments from the vicinity of existing structures, and activities associated with replacing uplands damaged by storms);
- NWP 7, *Outfall Structures and Maintenance* (adds authorization for removal of accumulated sediments from intake and outfall structures, and canals, if removal activities do not expand the structure or canal beyond its original configuration);
- NWP 12, *Utility Activities* (adds authorization for construction of substations, foundations for overhead utility lines, and access roads);
- NWP 14, *Linear Transportation Crossings* (adds authorization for larger crossings for public projects up to 1/2 acre in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters; and for public or private projects up to 1/3 acre in all waters); and
- NWP 27, *Stream and Wetland Restoration Activities* (authorizes restoration of non-tidal streams, open and tidal waters.)

As is typically the case with controversial and significant federal regulations, law suits have been filed to challenge the legality of the final rule, and members of Congress have taken an interest in the proposal. Those who support the rule are rallying their troops with messages such as this one from an environmental group:

> "[t]he National Association of Homebuilders has already filed a suit seeking to overturn the new permits. NAH and their allies are pressuring Congress to cut the Corps' budget for implementing the permits and to pass "riders" to appropriations bills that would throw out the permits. You can call, write, or email your Congressional Representative and tell them wetlands are important to you and your community and no anti-wetland riders or budget cuts should be passed".

Meanwhile, the new NWPs are in force while the suits wend their way through the courts, and the Corps is hard at work on its next once-every-five-years reissuance of the entire collection of NWPs.

DOES THE "MIGRATORY BIRD RULE" OVERREACH?

SUPREME COURT TO HEAR CASE ON EXTENT OF PERMISSIBLE FEDERAL WETLANDS JURISDICTION

The so-called "migratory bird rule"—the Corps' assertion of regulatory jurisdiction over "isolated" wetlands "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties" or "[w]hich are or would be used as habitat by other migratory birds which cross state lines"—has been

the subject of controversy for many years. During the upcoming term, the United States Supreme Court will be deciding who is correct: those who view the rule as "bird-brained," or those who see it as an important tool to protect the wetlands on which birds depend.

Why is this an issue? It is a fundamental principle that federal statutes (and their corresponding regulations) promulgated by the federal government must be empowered by the United States Constitution. Most environmental laws are based on the Constitution's Commerce Clause, which empowers Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." For many decades, the Commerce Clause power has been interpreted as virtually unhindered. In the past few years, however, the Supreme Court has issued a number of rulings that have recognized limits to the range of federal laws that can be authorized under the Commerce Clause, and a number of scholars predicted that the migratory bird rule was a likely candidate for Supreme Court examination.

In order to understand how this fight developed, one must start by looking at the actual language of the statute, as well as whether Congress gave any hints when enacting the language as to what they had in mind (so-called "legislative history"). The CWA prohibits discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." The legislative history of the CWA indicates that Congress "fully intend[s] that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." Based on this language and subsequent court cases, the Corps has employed potential use by migratory birds as a proper measure for commerce clause jurisdiction for many years.

The question now before the Court is "[w]hether the United States Army Corps of Engineers may, consistent with the Clean Water Act and the Commerce Clause, exercise regulatory jurisdiction over a series of permanent and seasonal ponds and small lakes that are used as habitat for numerous species of migratory birds." Although the Supreme Court heard a case in 1985 about the reach of the Commerce Clause with respect to wetlands regulation, explicitly unaddressed was whether the Corps' authority extended to "wetlands not necessarily adjacent to other waters."

The facts of the case that bring the migratory bird rule to the Supreme Court are interesting. In 1985, Solid Waste Agency of Northern Cook County, Illinois ("SWANCC"), a consortium of 23 municipalities, purchased a 533-acre site to construct a landfill facility to dispose of non-hazardous municipal waste for the approximately 700,000 people living in the agency's service area. SWANCC's plans called for filling approximately 17 acres of permanently or seasonally wet depressions left by earlier strip mining operations that have evolved into over 200 permanent and seasonal ponds "rang[ing] from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth." After initially determining that it did not have jurisdiction, the Corps later claimed jurisdiction over the site based on the migratory bird rule. Because the Corps asserted jurisdiction, SWANCC was required by Section 404 of the Clean Water Act to apply for a permit to fill the waters on the site. The Corps denied the permit.

SWANCC sought review in the Northern District of Illinois, arguing that the Corps' exercise of jurisdiction pursuant to the migratory bird rule exceeds its statutory authority under the Clean Water Act and violates the Commerce Clause. The district court rejected both arguments. The Seventh Circuit affirmed, holding that the scope of the CWA "reaches as many waters as the Commerce Clause allows" and that "destruction of the natural habitat of migratory birds in the aggregate 'substantially affects' interstate commerce" because "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds," including by "trave[l] across state lines." SWANCC disagreed, and asked the Supreme Court to give its opinion.

Like most Supreme Court cases, it is impossible to predict how this case will be decided. It will, however, be watched closely not only by those interested in wetlands law development, but also by those who follow interstate commerce clause jurisprudence. Perhaps the only interested parties who will not be watching are the birds.

PROPOSED REVISIONS TO REGULATORY DEFINITION OF "DISCHARGE OF DREDGED MATERIAL"

Finally, if the world of wetlands regulation wasn't experiencing enough turmoil given the new nationwide permits and the pending reassessment of the migratory bird rule, the Corps and EPA have recently proposed another significant regulatory change. The agencies would like to amend the regulatory definition of "discharge of dredged material" such that it creates a presumption that certain development and other activities will involve a discharge, and thus require a permit. This proposal is in response to the so-called "Tulloch rule" decision, a 1998 D.C. Circuit decision that the Corps did not have authority to regulate "incidental fallback" from excavation activities. Since that case was decided, "[u]pwards of 20,000 acres of wetlands were subject to ditching and more than 150 miles of streams channelized without undergoing section 404 environmental review or mitigation." In addition, at least 150 miles of streams have been "channelized" without environmental review or mitigation.

The "Tulloch rule" fight has been going on for many years. The rule overturned by the 1998 decision resulted from a settlement of a suit brought against property owners draining North Carolina wetlands by removing dirt from the site without a permit—at the time the "incidental" fallback from the land-clearing machinery

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was not subject to regulation. A coalition of industry organizations challenged the validity of the rule that was passed in settlement of that case, and after the D.C. Circuit issued its decision in National Mining Association, the EPA and Corps decided not to seek Supreme Court review.

This recent proposal would amend a final rule issued shortly after the D.C. Circuit decision, which excluded incidental fallback from the official regulatory decision. Currently, whether a particular redeposit is subject to CWA jurisdiction requires "a case-by-case evaluation, based on the particular facts of each case." The proposed rule responds to concerns from environmentalists, but is viewed with alarm by representatives of permit applicants, one of which noted that "builders and developers are excavating as allowed by law." Comments on the new proposal are due by the middle of October. Given the history of the debate and the strong views held on all sides of this issue, it seems unlikely that the rule will be issued in final form before the end of the Clinton Administration. In any event, if and when a final rule is issued, litigation is virtually certain.

CONCLUSION: EBB AND FLOW WILL CONTINUE, AND NEEDED STATUTORY REVISION UNLIKELY IN NEAR FUTURE

One scholar has observed that "[f]ederal treatment governing wetlands has been continually in flux, with the Congress, the executive branch, the federal agencies and the courts continually reacting to one another and attempting to define the parameters of the program, including the breadth of its application to wetlands." The developments discussed in this article support that assessment. But why is the world of wetlands law so unsettled?

In part, it may be because the Clean Water Act does not contain the word "wetlands." Wetlands laws and regulations have been cobbled together through interpretations that some call ingenious, and others attack as improper. Scholars have called for statutory amendment for years. Recent efforts to reauthorize and substantially amend the statute have, however, failed. Even efforts to make small amendments to section 404 have ended in impasse.

The reason for this gridlock is not clear. It may be "turf" battles over who should have authority and how much authority they should have. It may be the natural result of a democratic, political process. It may be the evolution of environmental laws, most of which were passed in the 1970s, and many of which have faced similar difficulties with wholesale amendment in recent years. Whatever the reason, those whose work may be impacted by wetlands laws and regulations are stuck with the current, imperfect system—at least for now.

Editor's Note: For an extensive list of references to this article, or for more information about statutory wetlands protection, contact Kim Diana Connolly at connolly@law.sc.edu.

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