



Ocean and Coastal Law Memo

OCEAN AND COASTAL LAW CENTER · SCHOOL OF LAW · UNIVERSITY OF OREGON · EUGENE 97403

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Developments in Wetlands Law

Because of the national attention focused on conserving remaining U.S. wetlands, the Ocean and Coastal Law Center has prepared this *Ocean and Coastal Law Memo* devoted to significant recent developments in wetlands law and policy at the federal and state levels.

I. Federal Regulatory Developments

A. *Memoranda of Agreement between the EPA and the Corps Allocating Regulatory Responsibilities*

In January 1989 three memoranda of agreement (MOAs) were signed that clarify wetlands regulatory roles under section 404 of the Clean Water Act, 33 U.S.C. sec. 1344 (1988), the most important federal statute regarding the regulation of dredging and filling of wetlands. The MOAs address jurisdiction determinations, enforcement responsibilities, and procedures for the Environmental Protection Agency (EPA) to determine if a discharge has been

authorized by the Army Corps of Engineers.

In the MOA addressing jurisdictional determinations, the Corps and the EPA agreed that the Corps would continue to make the bulk of the jurisdictional determinations in the field. However, Corps determinations must be made pursuant to EPA guidance. In the past, some parts of the Corps refused to follow EPA guidance. EPA assumes the role as the lead agency for developing guidelines for making decisions as to whether a given activity falls within federal wetlands jurisdiction. Furthermore, the EPA retains the authority to designate a particular case or class of cases in which the EPA will be the lead agency determining section 404 jurisdiction. Determinations of section 404 jurisdiction made pursuant to the MOA would be binding on federal agencies in subsequent federal action, including litigation.

The EPA retains a large measure of authority under this MOA regarding the determina-

tion of section 404(f) exempt activities which do not require a Corps permit. These activities are described in section 404(f) and include activities such as "normal farming, silvicultural, and ranching activities," maintaining existing dams, levees, bridge abutments, and similar activities.

Additionally, the Corps has agreed to provide the regional administrators of the EPA a list of all final determinations of "no jurisdiction" and make other jurisdictional determinations by the Corps available upon EPA's request. This will function as a means of tracking the Corps compliance with the EPA's guidelines and with the technical wetland delineation manual discussed below that has been issued by the EPA, U.S. Fish and Wildlife Service, Soil Conservation Service, and the Corps.

Under the second MOA addressing enforcement responsibilities, the Corps will continue to conduct the bulk of the enforcement investigations, including violations of Corps-issued permits and discharges



without a permit that do not qualify as "special cases" for the EPA. Where the Corps has issued a permit for the discharging activity, a determination by the Corps that no permit violation has occurred will be final. The EPA will assume a more active role in assessing penalties under the new agreement. In particular, the EPA will have the responsibility for policing unpermitted discharging activities that involve: (1) repeat violations; (2) flagrant violations; (3) special request cases (classes of cases or a particular case in which the EPA requests that it be the lead enforcement agency); or, (4) situations in which the Corps recommends that EPA administrative penalties may be warranted. In these situations, the EPA will be the lead enforcement agency rather than the Corps. A determination by the lead enforcement agency, whether it be the Corps or the EPA, regarding the appropriate enforcement action will be final. Another significant aspect of the MOA prevents the Corps from accepting an "after-the-fact" permit application until the lead enforcement agency has completed its enforcement action or made a decision to take no action.

The third MOA addresses procedures for the EPA to determine if a suspected discharging activity has previously received a Corps permit. If the EPA suspects that the discharging activity is illegal, it must notify the Corps district office to determine if the activity is subject to a general or individual permit. The Corps must then respond within a limited time period (ten working days, or two working days if the EPA supplies the Corps with adequate information to make a desk top decision) as to whether

the discharging is subject to a Corps permit. A Corps determination within the time period is final. However, the EPA may take immediate action if it believes that the discharge is not permitted and that immediate action is necessary. In such a case, the EPA must nevertheless notify the Corps and request that the Corps determine whether the activity is sanctioned by a Corps permit.

All three of the MOAs became effective on March 20, 1989 and are effective for five years from that date.

B. The Policy of "No Net Loss" of Our Nation's Wetlands

In his 1988 presidential election campaign, George Bush promised to prevent any net loss of our nation's wetlands. As president, Mr. Bush has asked the Domestic Policy Council's Inter-Agency Task Force to develop recommendations to attain this goal of "no net loss" of the Nation's wetlands.

In support of a no net loss policy, the EPA and the Corps developed mitigation requirements, set forth in a MOA between the Corps and the EPA, necessary to comply with the EPA's section 404(b)(1) guidelines for permits to fill wetlands. "Mitigation" denotes the use of the least environmentally detrimental alternative, described in the MOA as including "avoidance, minimization, and compensatory mitigation." The purpose of the MOA was to provide a regulatory framework for considering mitigation in order to promote consistency in all Corps and EPA field offices. It was not intended to change existing wetlands regulatory requirements. The original version of the

MOA, signed on November 14, 1989, made an across-the-board assertion that in all cases mitigation considerations would be necessary. The Corps was to "strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, . . . strive to achieve a goal of no overall net loss of values and functions."

However, under pressure from the Departments of Energy, Interior, and Transportation, the oil industry, state governments, and members of Alaska's congressional delegation, the original MOA was changed.

The revised agreement indicates that mitigation may not be required for "insignificant environmental losses." The introduction to the revised MOA specifically indicated that "in areas of the country where wetlands constitute a majority of the land type, minor losses of wetland functions may not need to be mitigated by offsite compensatory mitigation." The change essentially means that where wetlands are plentiful, such as in areas of Alaska, the destruction of a particular wetland will not always necessitate the construction of a replacement man-made wetland at another site. These changes weakened the Administration's commitment to no net loss of wetlands, according to Representative Frank Pallone (D-NJ). See 20 Env't Rep. (BNA) 1876 (March 16, 1990). Furthermore, according to the introduction to the MOA published in the Federal Register, 55 Fed. Reg. 9210 (1990), the consideration sequence for mitigation measures developed by the Corps and the EPA can be waived when a proposed discharge could be expected to result in "insignificant environmental losses."

The status of the overall federal policy of no net loss is presently in the hands of the White House's Domestic Policy Council. The Council sought public comment on the appropriate national policy through six regional public meetings held in the summer of 1990. Meetings were held in Bismarck, North Dakota; Peoria, Illinois; New Orleans, Louisiana; Olympia, Washington; Anchorage, Alaska; and Providence, Rhode Island. Each meeting sought to focus on regional as well as national wetlands issues to be considered in formulating a national no net loss policy.

C. *Wetlands Delineation Manual*

Through a joint effort of the EPA, the Corps, the U.S. Fish and Wildlife Service, and the Soil Conservation Service, an inter-agency cooperative publication has been developed to provide consistency in identifying wetlands subject to federal jurisdiction. The *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* is an attempt to reconcile inconsistent definitions of wetlands among federal agencies. The manual utilizes technical criteria, field indicators, and other sources of information for field personnel to draw upon for identifying and delineating wetlands subject to federal regulation.

The manual addresses criticisms made by the National Wetlands Policy Forum, convened by the Conservation Foundation at the request of the EPA, that the federal agencies were using different definitions and following different approaches regarding wetlands. The manual is now undergoing a nationwide review process.

D. *Section 401 Guidebook*

Under section 401 of the Clean Water Act, 33 U.S.C. sec. 1341, applicants for federal permits or licenses to discharge into navigable waters must provide the federal licensing or permitting agency with a certification from the state in which the discharge will originate that the discharge will comply with state water quality standards. A state can prevent the Corps from issuing a 404 permit if the state does not certify that the activity complies with state water quality standards.

In 1989 the EPA published *Wetlands and 401 Certification, Opportunities and Guidelines for States and Eligible Indian Tribes*. This guidebook attempts to show states and eligible Indian tribes how they can take advantage of the 401 certification process to protect state wetlands resources without passing major state legislation. Among the recommendations made in the guidebook, the EPA urges states to:

1. include wetlands in their definition of state waters;
2. develop or modify existing 401 certification and water quality standards to accommodate wetland considerations;
3. initiate or improve upon existing inventories of their wetlands resources;
4. incorporate 401 certification for wetlands into their water quality management processes and other programs affecting wetlands, including coastal zone management, nonpoint source, and wastewater programs;
5. place stringent conditions on section 404(e) nationwide

permit certification in their respective states; and

6. evaluate certification applications for after-the-fact permits sought from the Corps for past discharges into wetlands rather than waiving certification for after-the-fact permits.

Copies of the guidebook are available from:

EPA Office of Wetlands
Protection A-104F
401 M Street, SW
Washington D.C. 20460
(202) 382-5043

II. New Federal Legislation

The North American Wetlands Conservation Act, 16 U.S.C.A. sec. 4401 *et seq.* (West Supp. 1990), was signed by President Bush on December 13, 1989. The Act is designed to facilitate the conservation of wetland ecosystems in order to preserve, protect, and restore migratory birds, fish, and other wildlife of North America while pursuing the goals of the North American Waterfowl Management Plan and international obligations contained within the migratory bird treaties and agreements with Canada, Mexico, and other nations. The Act established a nine-member North American Wetlands Conservation Council made up of the Director of the U.S. Fish and Wildlife Service, the Secretary of the Board of the National Fish and Wildlife Foundation, directors of state fish and wildlife agencies from states situated within the four major migratory bird flyways, and three members, appointed by the Secretary of the Interior, from nonprofit organizations participating in wetlands conservation. The purpose of the Council is to recommend wet-

lands conservation projects to the Migratory Bird Conservation Commission, which was established under the Migratory Bird Conservation Act, 16 U.S.C. sec. 715(a)(1988).

Recommended projects that are approved by the Commission will be carried out with the assistance of the Department of the Interior. The federal government will fund up to 50 percent of projects located on non-federal lands and will fund 100 percent of projects located on federal lands, including the acquisition of inholdings within federal lands. The Act provides that, at the discretion of the Secretary of the Interior, up to 70 percent of the funds available in any given year may be spent on projects in Canada and Mexico.

The law authorizes appropriations of up to \$15 million annually for wetlands programs. It also makes another \$11 million available from taxes on hunting equipment.

The Act also provides for federal agency cooperation with the Fish and Wildlife Service in acquiring, managing, and disposing of federal lands to restore, protect, and enhance wetlands and other habitats for the benefit of migratory birds and other wildlife.

III. Federal Cases

A. Estoppel

In United States v. Boccanfuso, 882 F.2d 666 (2d Cir. 1989), the court reversed the District Court's holding that the Corps was estopped from asserting a claim against a private landowner who had filled a wetland within the Corps' section 404 jurisdiction. A Corps

employee had erroneously told the landowner that the Corps' jurisdiction extended only to the mean high water mark of the Saugatuck River near Westport, Connecticut, when in fact the Corps has asserted jurisdiction to the extreme high tide line in tidal waters. The Corps employee also stated that the landowner could place riprap in front of an old seawall within Corps jurisdiction without a Corps permit.

The Second Circuit Court of Appeals held that although the Corps' actions were less than exemplary, the assertions made by the Corps employee were insufficient bases to estop the government from asserting a claim against the landowner's activities in light of other information given to the landowner and the landowner's agent. The landowner had received numerous correct written and oral statements from the Corps that referred to the extreme high tide line as the extent of the Corps' jurisdiction. The Court pointed out that oral statements made by the government's employees or agents are not accorded the same weight as written ones. In light of the numerous written correspondence sent by the Corps to the landowner over the years, the Court held that the landowner was not reasonable in relying upon the government's oral misrepresentation as to its jurisdiction. The Court pointed out that estoppel can only be found against the government in very limited and unusual circumstances.

B. Section 404 and the Takings Clause

In Ciampetti v. United States, 18 Cl. Ct. 548 (1989), on the government's motion for summary judgment, the Claims Court ruled that a regulatory taking of

private property can be imputed to the federal government when a 404 permit is denied because of state action. New Jersey refused to grant the landowner a permit to develop his property under the New Jersey Coastal Area Facilities Review Act (CAFRA). The state also determined that the landowner's proposed development was not consistent with the New Jersey coastal zone management plan (CZMP). A consistency determination is required for a section 404 permit from the Corps under section 307(c)(3) of the Coastal Zone Management Act, 16 U.S.C. sec. 1456(c)(3).

Despite the presence of independent action by New Jersey in denying the CAFRA permit and the state's determination that the proposed development was inconsistent with the New Jersey CZMP, the Claims Court determined that state action is not a *per se* defense to a federal taking. Although successful completion of the state permitting process is a prerequisite for a federal permit, "Congress created the regulatory framework," and the section 404 process "begins and ends with the Corps."

In an action against New Jersey in state court, the landowner's taking claim was dismissed because of federal involvement in the form of a cease and desist order from the Corps. The Court indicated that the Fifth Amendment could not countenance a situation in which a landowner has no remedy under the takings clause simply because two government entities' actions combined to cause a taking.

The government also argued that the landowner's claim should fail under the "nuisance exception" to the Fifth Amendment takings clause. Essentially, the government argued that the

destruction of wetlands caused serious public health effects sufficient to cause a public nuisance; therefore, the landowner should not be able to recover just compensation because there is no reasonable property interest in creating a nuisance. The Court held that the public interest in the prevention of wetlands loss should be a factor to be taken into consideration with private property interests such as the economic impact of the government's action and the frustration of the plaintiff's "investment-backed expectations." The Claims Court indicated that the nuisance nature of the landowner's intended use of the property is just another factor to be considered in the takings analysis. Therefore, summary judgment was denied on this ground.

In Formanek v. United States, 18 Cl. Ct. 785 (1989), the Claims Court ruled that a takings claim was ripe for review when the Corps has made it clear in its first permit denial that any request by the landowner to fill in the wetland would be denied. The landowner need not submit a permit application for a smaller scale project when such a request would be futile according to the Claims Court.

To prevent such a takings claim from being ripe upon the denial of a 404 permit, the Court indicated that in the future the Corps should suggest alternatives or mitigation measures that the landowner may offer in order to get Corps approval for the project.

C. Section 404 Jurisdiction

Over a period of 100 years, a 153-acre tract of undeveloped land south of San Francisco known as the Newark Coyote

Property underwent a number of man-made changes. The land was converted from pasture land into a facility for the manufacture of salt. The owner of the property created crystallization basins and pits for depositing calcium chloride. After the salt manufacturing operations ceased, the crystallizers and calcium chloride pits remained.

In 1983 the Leslie Salt Company, owner of the property, plowed the property to combat a dust problem. The plowing permitted plants to grow on the property. The construction of a sewer line and public roads also affected the property--culverts now hydrologically connected the property to the Newark Slough, a tidal arm of San Francisco Bay. The state highway authority breached a levy on the adjacent San Francisco National Wildlife Refuge and destroyed a tide gate, permitting tidal backflow to reach the Leslie property. The U.S. Fish and Wildlife Service did not construct floodgates to prevent the inundation via the culverts from the adjacent wildlife refuge. The net effect of all of this human activity was to create wetland features on Leslie's property. Migratory birds and the endangered marsh harvest mouse began to use the property as habitat.

In 1985, when Leslie attempted to dig a feeder ditch and siltation pond to drain part of its land, the Corps issued a cease and desist order pursuant to its authority under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act. The Corps issued a second cease and desist order under section 404 when Leslie attempted to block a culvert by placing fill on another part of the tract in 1987.

In a court challenge to the Corps' action, the United States District Court for the Northern District of California ruled that the Corps had exceeded its jurisdiction under section 404. Leslie Salt Co. v. United States, 700 F. Supp. 476 (N.D. Cal. 1988).

On appeal, the Ninth Circuit reversed, holding that the Corps had jurisdiction over these artificially created wetlands. Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir 1990). The court distinguished the case from United States v. Fort Pierre, 747 F.2d 464 (8th Cir. 1984), which held that the Corps did not have jurisdiction over a wetland that formed on private land as a result of the Corps' own dredging activity on a nearby river. The court determined that the danger of the Corps trying to expand its own jurisdiction was not present in this case. The court held that it is irrelevant that the flooding was caused by the conduct of third parties, including the government. The court stated that, "Congress intended to regulate local aquatic ecosystems regardless of their origin."

Also, the court interpreted Corps regulations to include wetlands such as the crystallization basins and calcium chloride pits in the term "other waters" within the Corps' jurisdiction under section 404. There were three grounds for this determination:

1. the Corps did not intend to exclude artificially created wetlands in the definition of "other waters";
2. the Corps included other seasonally inundated land in its definition; and
3. the property falls within the commerce clause requirement

contained in the Corps' regulations for section 404 jurisdiction because the land is used by migratory birds and endangered species.

D. Section 404(c) Veto

In Russo Development Corp. v. Thomas, 735 F. Supp. 631 (D.N.J. 1989), the EPA had vetoed an after-the-fact permit issued to a real estate developer. The permit application sought Corps approval for the past filling of a parcel of land that had been developed for warehouse facilities. A permit had not been obtained from the Corps prior to the filling of a 44-acre parcel, though the development was approved by the state land use planning authority. The Corps subsequently determined that the 44-acre tract had in fact been wetlands subject to Corps jurisdiction. Therefore, the Corps conditioned the processing of a permit for the filling of Russo's undeveloped 13.5-acre parcel, located across the street, upon the landowner's applying for an after-the-fact permit for the 44-acre tract.

The developer brought suit in federal district court seeking declaratory and injunctive relief from the actions of the federal agencies. On cross motions for summary judgment, the court ruled that the Corps could not condition the processing of an application for a permit to fill an undeveloped tract of land upon the developer's submitting an application for an after-the-fact permit for another unrelated tract that had already been completely developed.

The court also held that under the Coastal Zone Management Act, the EPA was required to consider the New Jersey Coastal Management Program in

making its determination that certain properties qualify as wetlands and must explain its reasons for any deviations from that program.

The court requested additional briefing on the applicability of section 404(c) to after-the-fact permits. The developer had argued that the EPA can veto only prospective permits, not after-the-fact permits.

E. Enforcement

In United States v. Marathon Development Corp., 867 F.2d 96 (1st Cir. 1989), the court upheld a criminal conviction of a Rhode Island real estate development company and its senior vice president for illegally filling more than five acres of wetlands in Massachusetts. The district court had ordered a \$100,000 criminal fine against the company and sentenced the senior vice president to six months in prison and one year's probation (the trial judge suspended the prison sentence). The developer had purposely not sought a section 404 permit before filling, although both the Corps and environmental consultants had warned him that filling the area without a permit would violate the Clean Water Act.

On appeal the defendants argued that their activities were protected by a nationwide headwaters permit. See 33 C.F.R. sec. 330.5(a)(26)(1989) for the nationwide headwaters permit. The First Circuit Court found that Massachusetts had not given section 401 certification to the nationwide headwaters permit, and, therefore, the nationwide headwaters permit was inapplicable in Massachusetts. The court rejected the plaintiff's argument that section 401 certification was only applicable to

individual permit applications and not to nationwide permits.

A multimillionaire Wall Street investor pleaded guilty in U.S. District Court to a one-count misdemeanor for violating the Clean Water Act by destroying wetlands on his Maryland hunting retreat. 21 Env't Rep. (BNA) 297 (June 6, 1990). Under the plea bargain, Paul Tudor Jones III was ordered to pay a \$1 million fine and a \$1 million contribution to the National Fish and Wildlife Foundation for protection and preservation of the nearby Blackwater National Wildlife Refuge. Jones was also ordered to restore the wetlands he had destroyed. Additionally, the judge restricted Jones from hunting migratory waterfowl anywhere in the United States through 1991 and restricted him from developing 2,500 acres of his 3,272 acre estate on Maryland's Eastern Shore.

The case represents the largest illegal filling of a wetlands ever charged by the United States in a criminal case. Jones will pay the largest financial penalty ever against a person in an environmental criminal case.

William Ellen, Jones' project manager, was indicted on six counts of violating the Clean Water Act and one count of violating the Rivers and Harbors Act. He faces up to 31 years in prison, a \$50,000 fine for each day of the continuing violation, and a \$100,000 fine for violating the Rivers and Harbors Act.

In another criminal enforcement action, John Pozsgai was fined \$200,000 and sentenced to three years in prison for illegally filling wetlands. 20 Env't Rep. (BNA) 1574 (Jan. 12, 1990). After the Third Circuit Court of

Appeals rejected his appeal, Pozsgai filed a petition for certiorari with the United States Supreme Court arguing that the conviction under the Clean Water Act violated the due process clause of the Fifth Amendment and that the fine violates the Eight Amendment. 20 Env't Rep. (BNA) (270 May 25, 1990). Pozsgai's sentence was one of the first imposed for environmental crimes under the federal sentencing guidelines.

In a criminal case brought against landowners for illegally filling wetlands, the defendants were sentenced to serve 21 months in prison. These were the first people sentenced for environmental crimes under the new federal sentencing guidelines. The defendants have filed an appeal on the grounds the trial court misapplied the guidelines in handing down a 21 month sentence. *U.S. v. Mills*, 20 Env't Rep. (BNA) 1574 (11th Cir. Jan. 12, 1990). Ocie and Carey C. Mills have argued that the degree of the offense was improperly increased on the basis that there was actual environmental contamination. The Mills argue that the filling was innocuous to the ambient aquatic environment and that the wetland can be restored by removing the fill material.

IV. State Wetlands Developments

A. New Legislation

1. Oregon

The Oregon Legislature recently passed Senate Bill 3, which significantly overhauled Oregon's wetland regulation system.

The new law requires the Director of the Division of State

Lands to apply a priority list of mitigation measures when evaluating permit applications to alter wetlands. The Director must first consider the alternative of no action as a mitigating factor. Additional mitigating factors that must be considered in order include:

1. reducing the magnitude of the project;
2. repairing and restoring the affected environment;
3. corrective measures during the life of the action; and,
4. constructing replacement wetlands.

The new definition of mitigation seeks to avoid adverse impacts before resorting to requiring replacement wetlands as compensation for wetlands losses.

The legislation defines the term "wetlands" similarly to the definition used by the Corps of Engineers to provide more efficient planning and consistent regulation.

The legislation also permits city or county governments to submit "wetland conservation plans" for the Division of State Lands to review and approve. The Director may approve a plan, deny it, or impose conditions on approval. Approval does not relieve individuals of permit requirements. However, if a permit application is consistent with an approved local wetlands conservation plan, or can be conditioned to be consistent with it, the Division must issue the permit.

Another important provision in the Oregon legislation is that the Director *must* impose mitigation measures on any permit,

general authorization, or wetland conservation plan granted by the Division of State Lands. Mitigation had previously only been required for dredging or filling in intertidal estuarine areas.

2. Louisiana

In a special legislative session, the Louisiana Legislature passed a bill that establishes a cabinet-level Wetlands Conservation and Restoration Authority within the Office of the Governor. The Authority is to submit plans and proposals for wetlands restoration to the Governor on a yearly basis. The bill also appropriated \$15 million in 1989-90 and \$25 million in 1990-91 for a dedicated, recurring Wetlands Conservation and Restoration Fund for restoring Louisiana's vegetated wetlands.

A statewide referendum to amend the Louisiana state constitution to constitutionally dedicate the coastal restoration fund in perpetuity was put to Louisiana voters in October of 1989. The referendum passed by an overwhelmingly wide margin--60 of the 64 Louisiana parishes (counties) voted in favor of the referendum. The trust fund established by this amendment derives from oil and gas revenues rather than taxes. The fund has an annual cap of \$25 million and is limited to holding no more than \$40 million at any one time.

B. State Enforcement

The New York Department of Environmental Conservation has required a corporate park owner to pay a \$90,000 penalty for violations of New York's Freshwater Wetland Law, according to BNA's *Environmental Reporter*, 20 Env't Rep. (BNA) 1919 (March 30, 1990). This represents the largest penalty

New York has ever levied for a violation of the Freshwater Wetland Law.

The offenders filled two acres of protected wetlands and channeled an adjacent stream, causing damage to the bed and banks of the stream, severe erosion of the fill material, and siltation of the stream and remaining wetland.

C. *An Update on the Michigan 404 Program*

In 1984 Michigan became the only state to assume the administration of the section 404 program for the state's nonnavigable waters. Michigan remains the only state to assume this authority. In a 1989 issue of the Environmental Law Institute's *National Wetlands Newsletter*, two articles reviewed the progress of Michigan's section 404 program. Bostwick, *Michigan Section 404 Program Update*, Nat'l Wetlands Newsl., July-Aug. 1989 at 5; Brown, *Michigan: An Experiment in Section 404 Assumption*, Nat'l Wetlands Newsl., July-Aug. 1989 at 5.

The authors generally agreed on the benefits that have resulted from Michigan assuming this role. One major benefit for potential permittees is that permit applications are processed faster and with greater ease than if they were processed by both state and federal permitting agencies. Also, the Michigan Department of Natural Resources conducts onsite inspections of all project applications. The Corps had conducted onsite inspections in only a small number of permit applications; the remainder of the applications fell within nationwide permits or otherwise did not receive an onsite inspection. The authors also cited more thorough review of applications by the

state and comprehensive permit review in conjunction with other state regulatory programs as additional benefits of Michigan's section 404 program.

As disadvantages to the Michigan program, Bostwick cited cost, the possibility that the EPA may overrule a decision to grant a permit, and the loss of dual state and federal enforcement capability. Brown pointed out as a disadvantage the exemption of small isolated wetlands from the state regulatory program that would fall within Corps jurisdiction as "waters of the United States." Brown also suggests that the Michigan program is subject to the influence of local political considerations that would not normally affect Corps decisions. Finally, Brown points out that Michigan does not benefit from a well-developed administrative or judicial interpretation of "feasible and prudent alternatives" to wetlands alteration, in contrast to the federal requirement of "no practicable alternatives" which has benefited from federal guidelines and judicial interpretations.

Matt Morris
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