



# Wetlands Regulations and You

by Brian R. Smith

President Bush's support for the preservation of the nation's wetlands ("no net loss") and an increasing number of enforcement actions have brought these once lowly swamps and marshes to the attention of builders at all levels. Given these developments and the increasing scarcity of developable land in many areas, builders are finding it pays to work within the confines of the wetland permitting process.

## What is a Wetland?

Some may ask, "What is so important about a wetland?" The answer is that wetlands serve a number of ecologically important functions. They provide natural food control, crucial wildlife habitat, groundwater collection and recharge, water filtration, and, in many cases, human recreation as well. The ecosystem cannot survive without them.

There are a number of definitions as to what constitutes a wetland. For example, in 1977 and more recently, the Army Corps of Engineers' definition reads: "The term 'wetlands' means 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 1985, the U.S. Supreme Court upheld this definition in *U.S. v. Riverside Bay View Homes, Inc.*

As for the states, their definitions of coastal and freshwater wetlands vary, and space doesn't permit an exhaustive review here. Some states have definitions similar to the Corps of Engineers', while others are quite different.

At one time, wetlands occupied more than 200 million acres in this country. Today, more than half of those wetlands have disappeared. For this reason, most states where wetlands are a major feature now allow disturbance of destruction of wetlands only by permit.

## Federal, State, and Local Enforcement

A given wetland may fall under federal, state, and/or local laws and regulations.

**Federal.** The most far-reaching federal protection is provided by the Clean Water Act. When its provisions were first enacted in 1972, they provided, among other things, that the discharge of dredged or fill material into navigable waters was prohibited

without a permit. The Army Corps of Engineers, which oversaw the permit process, at first interpreted this Act literally as regulating only areas that are truly navigable. In 1975, however, it expanded its regulatory power to include freshwater wetlands that are periodically inundated and support vegetation that requires saturated soil conditions.

Since that ruling and the passage of the 1977 amendments to the Clean Water Act, the Army Corps of Engineers, in conjunction with the Environmental Protection Agency (EPA) and the U.S. Fish and Wildlife Service, has aggressively enforced wetlands regulations, sometimes seeking prison sentences as punishment for violation. In Florida, for instance, two men recently received 21-month prison terms for knowingly discharging fill material into wetlands and excavating a canal in violation of the Clean Water Act. (See *U.S. v. Mills*, U.S.D.C. Fla. No. 88-3100-WEA, 4/13/89.)

**State and local.** As federal enforcement has strengthened, so too have states taken greater measures to protect both tidal and inland wetlands. However, the enforcement of state wetlands laws vary considerably by state. In some states, enforcement and regulation of these laws is passed in part or whole to the municipalities. This municipal power is generally similar to that given to the towns and cities in reviewing and enforcing other land-use functions, such as planning and zoning.

Many states, however, also retain wetland regulatory authority at the state level, through the state environmental agency. Such states often authorize the state attorney general or prosecutor to seek both civil and criminal penalties for wetlands statute violations.

## The Cost of Builders

In the past, developers and builders could view wetlands as cheap, developable land, the most costly item involved being the fill required to alter the wetland terrain. Today, however, developing land on which wetlands exist is an expensive undertaking.

To begin with, any potential wetland site must be assessed in terms of its environmental importance. Of first priority is determining whether or not the area actually is a wetland. This can mean hiring consultants such as engineers, environmental biologist, or site planners.

If wetlands exist, the builder may then have to apply and pay for local,

state, or federal permits – often a long, complex process. For example, if a permit is required from the Army Corps of Engineers, the review may also be subject to scrutiny by the EPA and the U.S. Fish and Wildlife Service. Any resulting delays in the construction schedule can mean thousands of dollars.

Finally, if either intentionally or accidentally, a builder builds on a wetland without obtaining the proper permits, local, state, or federal agencies may bring enforcement actions. The resulting legal costs alone would be painful, and the builder might suffer civil fines, criminal penalties, and jail terms as well.

## Avoiding Enforcement Action

The best way to avoid enforcement of wetlands regulations is to avoid purchasing wetlands in the first place. For properties that are borderline, this may mean hiring a biologist, soil scientist, or wetlands specialist to evaluate the property. At the least, if may require checking state and/or local wetlands maps – with a careful check of the date the maps were made, since wetlands boundaries often change.

If you buy a site on or near wetlands, be sure to check with federal, state, and local officials during the development planning process. Meetings held with regulators before the permit application process begins can help avoid opposition to the project and prevent expensive misunderstandings. Keep careful records of any verbal or written agreements with the regulatory agencies.

Once permit approval has been granted, heed carefully the conditions imposed by the permit and seek the permitting agencies' input if any of the conditions seem unclear. If will at times be tempting to sidestep one or two requirements to save time or money, but to do so is to risk an enforcement action. If in doubt, ask.

Wetlands regulations are here to stay, and the builder that goes against them does so at considerable risk. It is both good ecology and good business to comply with today's wetlands requirements. ■

*Brian R. Smith is an attorney in the Land Use and Environmental Practice section of Robinson & Cole, a 135 – lawyer practice with offices in Hartford and Stamford, Conn. If you have legal questions you'd like considered in this column, please send them to The Legal Column, c/o JLC, RR#2, Box 146, Richmond, VT 05477.*