

Wetlands Quandaries

By William Terry Bray and Judon Fambrough

One of the most controversial land-use regulations recently imposed by the federal government is the Federal Wetlands Act. The controversy stems not from the legislation's intent but from the lack of a clear definition of wetlands.

Some of the definition problem is tied to the evolution of legislation. In 1899, Congress passed the Rivers and Harbors Act requiring a permit to dredge, fill or obstruct U.S. navigable waters. The term *navigable waters* included only water used for interstate commerce and below the high-tide mark.

In 1972, the Federal Waters Pollution Control Act Amendments was passed. Section 404 of the legislation, known today as the Federal Wetlands Act, requires a permit to discharge dredged or fill material into any U.S. waters, including territorial seas. Because both acts cover navigable waters, authority overlaps.

The conflict was not resolved by Congress but by regulation. Regulations require a Section 404 permit for discharges in all waters such as "intrastate lakes, rivers, streams (including intermittent ones), mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds, the use, degradation or destruction of which could affect interstate or international commerce." Also, wetlands bordering or contiguous to navigable waters, including isolated wetlands separated from other waters of the United States by constructed dikes or barriers, natural river berms, beach dunes and similar features were included.

The isolated wetlands have generated controversy. Landowners argue that small potholes, for example, do not affect interstate commerce. However, the U.S. Army Corps of Engineers (Corps) has ruled that if migratory waterfowl can use a pothole for a resting area, interstate commerce is affected. This rule has been judicially overturned in two federal circuits, neither of which includes Texas.

In 1977, President Carter issued Executive Order 11990 entitled "Protection of Wetlands." The purpose of the order was "to avoid to the extent possible the long- and short-term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support or new construction in wetlands wherever there is a practicable alternative." The order clarified the national policy regarding wetland loss and effectively prohibited the use of federal funds on projects having an adverse impact on wetlands.

Defining Wetlands

Because of the lack of clear direction, each federal agency forged its own definition of *wetlands*. The most important one is found in the federal regulations. Used by the Environmental Protection Agency (EPA) and the Corps, it describes wetlands as "[t]hose 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." The definition describes three characteristics of a wetlands: hydrology (presence of

water), aquatic vegetation and hydric (or saturated) soils.

To reduce the confusion among the federal agencies, the EPA, the Corps, the Fish and Wildlife Service (FWS) and the Soil Conservation Service (SCS) jointly adopted a manual in 1989 for identifying and delineating wetlands. The manual used the same three parameters mentioned earlier: hydrology, vegetation and hydric soils. Hydrology was the most controversial of the three. The manual held that if an area is saturated seven or more days during the growing season, and if the proper vegetative and hydric soils are present, the area is a wetlands.

Two important observations can be made. First, the classification of an area as wetlands can change from year to year depending upon the amount and timing of rainfall. Second, a wetlands cannot necessarily be identified by sight.

However, the 1989 manual was issued without the public notice and comment required by law. In 1992, Congress prohibited the Corps from expending any funds to apply the 1989 manual. The amendment effectively reinstated the 1987 manual previously adopted by the EPA and the Corps but without the consent of the other agencies.

The controversial classification of certain areas as wetlands intensified when the Fifth Circuit Court, which includes Texas in its jurisdiction, held that the clearing of bottomland hardwood forest requires a 404 permit. The court reasoned that a discharge of fill material occurs when roots are pulled out of the ground and redeposited in another area. Some attorneys maintain that bottomland hardwood forest may be cleared without a 404 permit as long as the trees are cut above ground so that roots are not disturbed.

Identifying wetlands is a technical matter. The service of a trained professional is recommended. However, some information is available from public sources. Landowners and developers may consult the National Wetlands Inventory maps maintained by the FWS. Also, the SCS soil maps may disclose the presence of hydric soils.

Although the Corps has jurisdiction, several exemptions within the act require no permits. These include discharges from normal farming, forestry and ranching activities and discharges for the maintenance of farm or forest roads. The regulations also excuse certain activities from a permit when they are conducted in a prescribed manner. Although a misnomer, these activities are labeled nationwide permits (NWP). Presently there are 36 excused activities.

Of special interest to landowners and developers is NWP number 26. If a discharge of fill material does not cause the loss of more than one acre of water (wetlands), no notice to or permit from the Corps is required. If, however, the discharge causes the loss of more than one acre but no more than ten acres, the Corps must be given a notice 30 days prior to the discharge. The notice must delineate the wetlands receiving the fill.

Because many subdivision developments involve a piecemeal invasion of wetlands, special provisions address how many times NWP number 26 may be used. For any real estate subdivision created after October 5, 1984, only one NWP number 26 may be used for the entire area within the subdivision.

A separate NWP number 26 cannot be used for the development of each lot or tract.

Two other NWPs may interest landowners and developers. NWP number 14 allows roads to cross wetlands as long as the fill area does not exceed one third of an acre. NWP number 40 allows farm buildings to be built on agricultural land converted from wetlands prior to December 23, 1985, as long as the foundation does not exceed one acre. No farm buildings may be built in or on prairie potholes, playa lakes or springs.

If an activity is not exempted by the act or excused by regulations, the person or entity must apply to the Corps for a 404 permit. An application includes the following steps: preapplication consultation with the Corps, formal application to the Corps for the permit, posting of public notices by the Corps, public comment invited and a public hearing conducted by the Corps, a public-interest review undertaken by the Corps, and a review by other federal and state agencies. At the end, the Corps must either deny the permit, issue the permit as requested or issue the permit with modifications or special conditions such as mitigation.

Generally, the process takes 60 to 90 days unless special circumstances are encountered, such as an environmental impact statement requirement. The permits are effective for three to five years. If the permit is denied, the applicant's only recourse is to the courts.

**“Each federal
agency forged its
own definition
of wetlands.”**

Mitigation Expensive

Possibly the most critical step in the process is the review by other federal and state agencies that can deny the permit or impose expensive mitigation. Mitigation requires the creation of the functional equivalent of the destroyed wetlands. The functional equivalent may be several times larger than the area destroyed.

Some of the more important federal and state agency reviews include the following. First, the FWS and, in Texas, the Texas Parks and Wildlife Department, must assess the impact the project will have on endangered species or their habitat.

Second, the Corps may conduct or require the applicant to conduct a cultural resource survey to determine if the activity will adversely affect historic resources listed or eligible for listing in the National Register of Historic Properties.

Finally, the Corps must determine if the project significantly affects the quality of the human environment. If so, an environmental impact statement may be required in accordance with the National Environmental Protection Act.

On all applications, the position of the Corps is clear—avoid adverse effects on wetlands. If unavoidable, the applicant must mitigate the impact to the extent appropriate and practicable.

The burden placed on landowners and developers planning construction in wetlands is extensive. The application for a permit invites public scrutiny, an examination by federal and state agencies,

Minimizing Wetlands Entanglements

Wetlands regulations have a tremendous impact on the use and transfer of land. Horror stories fill newspapers and magazines. Many projects have failed because the landowner or developer either was unfamiliar with or chose to ignore the law. Present and prospective landowners and developers may find the following suggestions useful.

1. Before purchasing any property, hire a competent consultant to determine the presence of any wetlands, endangered species or their habitat (endangered species), or a registered historical site or sites eligible for registration (historical sites).
2. Require the seller to warrant or represent in the sales contract or at closing the absence of any wetlands, endangered species or historical sites as of a precise moment in time. Circumstances may change after the warranty or representation.
3. Inform the lender of any presence of wetlands, endangered species or historical sites on the property. The presence of any of the three could reduce the availability of federal funds.
4. Before closing on a purchase, check with the Corps for reported or pending violations of the wetlands act on the tract. If the prospective seller has been issued a 404 permit, have the permit transferred to the buyer.
5. If a tract already has been purchased, manage it properly. Be especially careful not to inadvertently create artificial wetlands by blocking drainage areas.
6. If wetlands, endangered species or historical sites are on the property, the property taxes should reflect the lower value attached to the restrictive uses.
7. Avoid attempting to bypass the act by draining the wetlands to alleviate the problem. Although a 404 permit is not expressly required to drain wetlands, a federal district court in Texas has ruled that draining is a regulated activity requiring a permit.
8. Inform any contractors or subcontractors as early as the prebidding stage that a project involves wetlands. Contractors may be unable to conduct operations as usual and incur greater costs.
9. Retain the services of not only a good wetlands consultant but also competent legal counsel. Dollars spent avoiding problems are a wise investment.

potential project changes to minimize the loss of wetlands, and possible costly mitigation.

However, the act easily is violated unintentionally. Unless exempted or excused, any discharge of dredged or fill material into a wetlands requires a permit. *Fill material* is defined as any material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a water body. Merely casting a cloud of dirt into a moist area or depression could constitute a violation.

The cost of violating the act is high. The statutes authorize civil penalties up to \$25,000 per day of violation. In addition, criminal fines up to \$25,000 per day of violation, imprisonment for not more than one year or both may be imposed.

Because agencies and the courts have asserted that a "day of violation" includes not only the days that the actual discharge takes place but also each day that the discharged material is allowed to remain, the penalties for unauthorized discharges may be enormous.

In the legislative history of the wetlands act, Congress has used the word *wetlands* only once—in the 1985 Farm Bill. Congress never has determined conclusively what areas fall within this category. The current regulatory scheme evolved through judicial decrees, executive orders and regulations promulgated by various government agencies.

Any person contemplating land development or land purchase for development should have qualified experts examine the property for the presence of wetlands. If wetlands are determined, a 404 permit must be obtained from the Corps unless the activity is exempted by the act or excused by the regulations. The penalties for violating the act are severe.

This article is for information only and is not a substitute for legal counsel. ☒

This article is based on presentations at "Texas Wetlands," a 1992 conference sponsored by CLE International, and on a previous article by Bray. Bray is an attorney with Graves, Dougherty, Hearon & Moody, P.C., Austin, Texas. Fambrough is an attorney, member of the State Bar of Texas and a senior lecturer with the Real Estate Center at Texas A&M University.

A Reprint from the REAL ESTATE CENTER Journal

Vol. 7, No. 2 January 1993

Interim Director
Chief Economist
Senior Editor
Associate Editor
Assistant Editor
Art Director
Assistant Editor
Circulation Manager
Production Assistants

Advisory Committee

Typography
Lithography
Real Estate Center Journal

Gary Maler
Dr. Ted C. Jones
David S. Jones
Dr. Shirley E. Bovey
Karen W. Pilant
Robert P. Beals II
Rolanda Warren-Yarbrough
Gary Earle
Emma Kubin, Kammy Senter, Amy Todd

Conrad Bering, Jr., Houston, chairman; Michael M. Beal, Bryan; Patsy Bohannan, The Woodlands; Don Ellis, Del Rio; Alberto R. Gonzales, Houston; Dr. Donald S. Longworth, Lubbock; Richard S. Seline, Washington, DC; Jack W. Tumlinson, Cameron; Thomas A. Wilder, North Richland Hills; and Henry Santamaria, El Paso, ex-officio representing the Texas Real Estate Commission.

Real Estate Center
Williamson Printing Corporation, Dallas

The Journal (ISSN 0893-3332), formerly *Tierra Grande*, is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115 (telephone 409-845-2031). Comments from readers are welcome.

Subscriptions are free to real estate licensees who provide their name, address, telephone and license numbers to Department JS at the address given. Other subscribers, \$20.

Address changes should include name of the magazine, old and new addresses, real estate license number, telephone number and old mailing label.

Permission to reprint is granted for articles and columns, excluding photographs and illustrations, providing proper credit is given the *Real Estate Center Journal* and the Real Estate Center.

Views expressed are those of the authors and do not imply endorsement by the Real Estate Center, the College of Business Administration and Graduate School of Business, or Texas A&M University.