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Abstract

Views of wetlands as wastelands and sources of disease that may only be redeemed via reclamation is an anachronistic viewpoint. Today, the multiple ecological functions wetlands play are becoming increasingly widely recognized, according greater priority to their protection. This chapter addresses some of legal instruments granting exclusive use of wetland areas in the USA. Given the fragile nature of wetlands coupled with the social costs of wetland destruction, the US Congress established a permitting program in the 1977 Amendments to the 1972 Clean Water Act (CWA), specifically to preserve wetlands from unintentional or intentional destruction. In addition, “adjacent” wetlands, which may have never been inundated by the waters of the actual wetlands, are subject to federal regulation. “General permits” are issued by the US Army Corps of Engineers for activities likely to have a minimal adverse impact on wetlands, and “individual permits” are mandatory for activities likely to have significant impacts on

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wetlands such as dredge and fill activities. Unfortunately, isolated wetlands with no “significant nexus” to any navigable water body (30–60% of US wetlands) are not subject to this revised federal law, limiting their protection.

Keywords

Disease · Ecological functions · Protection · USA · Clean Water Act · CWA · Adjacent wetlands · General permits · Army Corps of Engineers · Individual permits · Dredge and fill · Isolated wetlands

Gaining Access to Wetlands

Often thought of as dismal, dank, and murky mosquito-infested pools of water, wetlands were either avoided or destroyed in the name of real estate development. However, asserting wetlands are wastelands of disease that may only be redeemed via reclamation is a viewpoint of the past. Now the important ecological functions wetlands play are becoming increasingly widely recognized and, therefore, protecting such areas is receiving greater priority.

Licensing Wetland Use in the USA

This chapter addresses some of legal instruments granting exclusive use of wetland areas in the USA. The US definition of wetlands (see 33.C.F.R. §328.3 (b)) describes them 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 may purify air and water, serve as habitats to marine species and birds, form a natural break for a structure, or absorb rainwater to prevent a flood. Given the fragile nature of wetlands coupled with the social costs of wetland destruction, the US Congress established a permitting program in the 1977 Amendments to the 1972 Clean Water Act (CWA), 33 U.S.C.A. §1251.

Although the general purpose of the CWA is to reduce national water pollution problems, 33 U.S.C.A. §1344 specifically preserves wetlands from unintentional or intentional destruction. Congress’ authority to regulate water pollution is derived from the Commerce Clause of the US Constitution in which all navigable waters may be subject to federal legislation. A wetland is deemed navigable given the CWA defines “navigable waters” broadly, and the Environmental Protection Agency (EPA) and Army Corps of Engineers defined “waters of the United States” to include wetlands. 33 C.F.R. §328.3(a)(7). In addition, “adjacent” wetlands, which may have never been inundated by the waters of the actual wetlands, are subject to federal regulation under the §404 permitting process.

Who May Grant the Power to Use a Wetland?

The CWA authorizes the Army Corps of Engineers to issue permits for applicants to discharge dredged or fill materials into navigable waters at particular locations. The Corps can issue the permit only if it finds that the dredge and fill activity will not significantly pollute the nation's waters and no practicable alternative exists that would be less degrading to the aquatic environment.

How May One Possess Exclusive Use of a Wetland?

Section 404 provides two types of permits. "General permits" are issued by the Corps for activities, which are likely to have a minimal adverse impact on wetlands. General permits apply on a national, regional, or state-wide basis for particular categories. In contrast, "individual permits" are mandatory for activities, which are likely to have significant impacts on wetlands, such as dredge and fill activities. Individual permits may only be awarded after public notice and comment. In determining whether a permit may be granted for dredge and fill activities, a balancing test is invoked by the Corps. The test requires the Corps to analyze the probable impact of the proposed activity and its intended use on the public interest. Under 33 C.F.R. §320.4, the benefits which reasonably may be expected from the activity are balanced against the foreseeable detriments. However, even if the Corps determines granting a permit is in the public interest, the EPA may still veto the decision if less detrimental alternatives to the dredge and fill activity or the permitted activity would have an unreasonable effect upon recreation areas, water supplies, fish, or wildlife.

The States' Role

US states also play a critical role in the federal wetlands permitting program as provided in §401(a) of the CWA, 33 U.S.C.A. §1341(a). In addition to providing states with veto power over §404 permits, §401(d) provides states the ability to impose "any...limitations, and monitoring requirements necessary to assure...compliance with any applicable effluent limitations or other limitations...of this title..." Such limitations become "a condition on any Federal license or permit." Attempts to minimize the states' authority under §401 have been defeated.

Prospective Challenge

Isolated wetlands with no "significant nexus" to any navigable water body are not subject to federal law §404 dredge and fill permitting under the US Supreme Court's holding in *Solid Waste Agency of Northern Cook County v. United States Army*

Corps of Engineers, et al. (2001). Unfortunately, such interpretation equates to 30–60% of the US wetlands, which are therefore unprotected by the CWA. Despite the federal government being precluded from regulating isolated wetlands, state governments have independent regulatory authority to limit dredge and fill activity within such areas.

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Wetlands, US EPA. <http://water.epa.gov/type/wetlands/>
Clean Water Act Section 404(q) Dispute Resolution Process. <http://water.epa.gov/type/wetlands/outreach/upload/404q.pdf>

Additional Reading

- U.S. Army Corps of Engineers. <http://www.usace.army.mil>
State Wetlands Programs. <http://www.aswm.org/swp/states.htm>
Revisions to Clean Water Act Regulatory Definition of “Discharge of Dredged Material”. <http://water.epa.gov/lawsregs/lawsguidance/cwa/dredging/2001rule.cfm> 17 Jan 2001.
National Wetlands Inventory Report. <http://www.fws.gov/wetlands/Status-and-Trends/index.html>