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**Shifting the Battlefield: Against a backdrop of controversy,
federal wetlands policy moved to a functional approach to mitigation
and limited authority over isolated, intrastate wetlands**

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Introduction

In a significant and far-reaching shift, federal wetlands regulators will now rely on wetlands functions rather than acreage replacement in evaluating compensatory mitigation proposals under the "no net loss of wetlands" policy. A second important change involves a proposal to limit federal authority over isolated, intrastate wetlands. In December 2002 and January 2003, in the span of a few weeks, the Bush administration issued guidance and a notice of proposed rulemaking on these issues.

National Wetlands Mitigation Action Plan

On December 24, 2002, the Bush administration released its National Wetlands Mitigation Action Plan, which is designed to better achieve the existing federal goal of "no net loss" of wetlands. The Action Plan states that it will achieve this goal "by undertaking a series of actions to improve the ecological performance and results of wetlands compensatory

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mitigation," and that this "will help ensure effective restoration and protection of the functions and values of our Nation's wetlands."

Background

The Action Plan was developed in response to a report criticizing the effectiveness of compensatory mitigation issued in 2001 by the National Academies of Sciences' National Research Council ("NAS") and followed a broad stakeholder gathering in October 2001. It is the result of a coordinated effort among the U.S. Army Corps of Engineers, EPA, Department of Agriculture, Department of the Interior, Federal Highway Administration and the National Oceanic Atmospheric Administration.

The Action Plan lists several themes that will guide future agency actions, including consultation with states, tribes and interested parties, basing compensatory mitigation on science, and emphasizing accountability, monitoring and follow-through. It then sets forth 17 action items that will be implemented by an interagency team to be set up for this purpose.

Action Items

The first action item, clarifying recent mitigation guidance, has already been accomplished and is discussed below. The remaining action items are broken down into several categories:

- Integrating compensatory mitigation into a watershed context by developing guidance on, among other things, the use of on-site versus off-site mitigation and the use of vegetative buffers;
- Improving compensatory mitigation accountability through new guidance on the feasibility of certain mitigation measures;
- Clarifying performance standards by adapting the NAS recommended guidelines for creating or restoring self-sustaining wetlands; and

- Improving data collection and availability with a shared mitigation data-base and an annual public report card on compensatory mitigation.

The Action Plan is available on the Web at: www.epa.gov/owow/wetlands/NWMAP122402signed.pdf.

Compensatory Mitigation Guidance

On December 24, 2002, the Corps of Engineers also released its Regulatory Guidance Letter ("RGL") No. 02-2, entitled "Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899." It is available on the Web at: www.nwp.usace.army.mil/op/g/notices/rgp2002.pdf.

Purpose and Applicability

The RGL, which implements one of the action items in the Action Plan discussed above, applies to all compensatory mitigation proposals in connection with permit applications filed after December 27, 2002 and supersedes RGL 01-1 issued October 31, 2001. The stated purpose of the RGL is to support the national policy of "no overall net loss" of wetlands and to reinforce the Corps' commitment to protecting wetlands while allowing permittees to provide appropriate and practicable mitigation for authorized impacts to aquatic resources.

"Functional Assessment Method"

The most important change in the RGL is its shift in the Corps' mitigation policy from requiring strict acreage replacement toward requiring the replacement of wetlands functions. The Corps' mitigation objective is now to provide, at a minimum, one-to-one functional replacement, or "no net loss of functions." This may be achieved in some cases by replacing a

wetland with a smaller wetland if the replacement wetland is of higher function. As a result, the Corps concedes that its "no overall net loss of wetlands" goal may not be achieved for each and every permit decision; rather, the Corps intends to achieve this goal on a cumulative basis.

Where there is an absence of definitive information on the functions of a wetland, the Corps will still use acres as the standard measure for determining wetlands impacts and required mitigation. However, the RGL instructs Districts wherever possible to use a "functional assessment method." Given the unique ecological characteristics of each aquatic site, the RGL states that focusing on replacement of the functions provided by a wetland, rather than simply the acreage lost, will more effectively enhance environmental performance. Under this approach, Districts will assign scores to particular functions using assessment techniques generally accepted by experts in the field, the best professional judgment of federal, tribal and state agency representatives, and the Section 404(b)(1) Guidelines. Fortunately, the RGL requires that the District make its chosen assessment method available to applicants.

Types of Allowable Mitigation Projects

As mitigation alternatives, applicants may propose the use of mitigation banks, in-lieu fee arrangements, or separate-activity specific projects. The four types of wetland projects available under the RGL are familiar: (1) creation of a new wetland; (2) restoration of a former wetland or a degraded wetland; (3) enhancement of specific functions; or (4) preservation by the removal of a threat to, or preventing the decline of, wetland conditions. As part of specific wetland projects, Districts may require on-site or off-site mitigation; in-kind or out-of-kind mitigation; or buffers.

The Corps will be making mitigation plans for individual permits available for public review and comment. As always, pre-application consultation is recommended to discuss compensatory mitigation proposals with the Corps prior to filing. Since compensation is the last step in the Corps' sequencing guidelines, the RGL states that Districts should not require detailed compensatory mitigation plans until they have established "the unavoidable impact"; or, to put it more bluntly, reducing your impacts may reduce your mitigation.

Components of a Mitigation Plan

Compensatory mitigation plans must contain the following components: baseline information concerning the impacted resources, goals and objectives for the mitigation plan, the factors considered in site selection, written specifications and work descriptions, performance standards, the parties responsible for compliance, description of the legal means for protecting mitigation areas, contingency plans for unanticipated site conditions or changes, monitoring and long-term reporting plans, and financial assurances and contingency funds set aside for remedial measures. The level of information provided in a mitigation plan "should be commensurate with the potential impact to aquatic resources."

While it may never be possible to determine whether the Corps has achieved its goal of no net loss of wetlands functions, most interested parties should be encouraged that their government will now be evaluating wetland mitigation proposals based upon scientific factors rather than a mere bean-counting of acres. Of course, from the applicant perspective, whether this new approach will add further expense and delay to an already cumbersome process remains to be seen.

Proposed Rule Making on Federal Wetlands Jurisdiction

On January 15, 2003, the Corps of Engineers and EPA published in the Federal Register an Advance Notice of Proposed Rule Making ("Notice") seeking comments on the scope of the "waters of the United States" subject to the Clean Water Act ("CWA"). The cause of this reassessment was the U.S. Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC"). In that case, the Supreme Court held that the Corps exceeded its authority under the CWA by asserting jurisdiction over isolated, intrastate, non-navigable waters based on their use as habitat for migratory birds pursuant to the "Migratory Bird Rule."

Migratory Bird Rule

Published in 1986, the Migratory Bird Rule is actually not a "rule" at all. Rather, in the preambles to their regulations defining "waters of the United States" under the CWA, the Corps and EPA provided examples of the types of links to interstate commerce which might serve as a basis for CWA jurisdiction over intrastate waters. These included use of waters: (1) as habitat by birds protected by migratory bird treaties or which cross state lines; (2) as habitat for endangered species; or (3) to irrigate crops sold in commerce. The EPA and Corps now acknowledge that these bases for asserting jurisdiction were rejected by the Supreme Court in *SWANCC*.

In addition to the Migratory Bird Rule, the Corps and EPA regulations also list other factors supporting federal jurisdiction over isolated, intrastate, non-navigable waters:

- (i) Use of the water by interstate or foreign travelers for recreational or other purposes;

- (ii) the presence of fish or shellfish that could be taken and sold in interstate commerce; or
- (iii) the use of the water for industrial purposes by industries in interstate commerce.

Comments Sought on Corps' Jurisdiction

The Notice solicited comment from the public as to whether, and under what circumstances, the three factors listed above (or any other factors) provide a basis for CWA jurisdiction over isolated, intrastate, non-navigable waters. The Notice also requested public comment on whether the CWA regulations should define "isolated waters," and if so, the factors to be considered in determining whether a water is or is not isolated for jurisdictional purposes. Finally, the Notice sought technical information regarding the resource impacts to wetlands and other waters that may be affected by the issues raised by the Notice. Comments or information in response to the Notice were required to be submitted by April 16, 2003 (this was an extension from the original deadline of March 3, 2003).

Legal Memorandum by Corps and EPA

Along with the Notice, the Corps of Engineers and EPA issued a Joint Memorandum, signed by their general counsel, providing clarifying guidance regarding federal wetlands jurisdiction in the wake of the *SWANCC* decision. In it, the top legal counsel at the Corps and EPA instruct their staff to stop using the Migratory Bird Rule and to check with their headquarters before relying on related bases of jurisdiction.

The Joint Memorandum states that in light of *SWANCC*, field staff of the two agencies should not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis for asserting such jurisdiction rests on any of the Migratory Bird Rule factors. In addition, field staff are directed to seek formal, project-specific

headquarters approval prior to asserting jurisdiction over such waters based on any of the other three factors listed above (i.e., waters used by interstate or foreign travelers, by fish sold in interstate commerce, or by industries in interstate commerce). However, field staff are instructed by the Joint Memorandum to continue to assert jurisdiction over traditional navigable waters and their adjacent wetlands and, generally speaking, their tributary systems and adjacent wetlands.

The Notice and Joint Memorandum are available on the Web at: www.usace.army.mil/inet/functions/cw/cecwo/reg/ANPRMwaters.pdf.

Conclusion

It is far too soon to evaluate the effectiveness of the new wetlands mitigation guidance in achieving the goal of preventing a net loss in wetlands functions. Indeed, as noted above, it may never be possible to quantify its effect with reliable precision, although the new mitigation data base and annual public report card should help. However, what is more certain is that the regulators' change in emphasis toward functions over acreage cannot be labeled a clear victory for one side or the other. For just as a smaller replacement wetland may provide the same function, so, too, may a larger (or very expensive) wetland be required to replace the functions provided by a wetland on another site.

The proposed rulemaking and joint legal counsel memorandum on jurisdiction over isolated intrastate waters portend a more definitive change in wetlands regulation throughout the United States. If the Corps decides to abandon jurisdiction over isolated waters possessing the other factors beyond the Migratory Bird Rule (such as waters used by interstate industries

or by interstate travelers for recreational purposes), a potentially large number of wetlands will no longer be subject to federal regulation. Whether you call that an abdication of federal responsibility, appropriate local flexibility, or another unfunded mandate, depends upon your perspective. But whether they like it or not, for the remainder of the present administration, stakeholders are well advised to prepare for a continued shifting of the battlefield toward state and local government.