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John R. Nolon

*Elisabeth Haub School of Law at Pace University*

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## Smart Growth: Wetlands Protection Invites Reflection on Federal Law

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John R. Nolon

[Professor Nolon is the Charles A. Frueauff Research Professor at Pace University School of Law and the Director of its Land Use Law Center.]

**Abstract:** Although land use regulation at the federal, state, and local level are independent entities, integrating their functions may prove to be a successful method to facilitate smart growth and to protect wetlands. This article examines environmental regulation for wetlands at several levels of government. Specifically, this feature discusses federal command and control environmental laws and state government (New York and Connecticut) regulation efforts, which are justified though state sovereign police power. Also discussed, is the role of local government to act within their jurisdictions, and how governmental forces may agree upon joint resolutions in order to solve national problems. For example, some states have programs to enforce federal legislation such as the Clean Water Act.

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Most scholarly articles on the topic of smart growth begin their analysis from the federal or state level and examine how these higher levels of government can achieve smart growth development patterns. In six previous columns, I have examined smart growth strategies at the local level covering topics ranging from local zoning and planning to the adoption of local natural protection laws. This article begins an examination of how local and environmental laws fit into the system of federal environmental protection. It does so by focussing on wetlands regulations at the local and state level in Connecticut and New York and commenting on the federal environmental regime within which they operate.

Local wetlands regulations can be an integral part of the municipality's smart growth strategy. Generally, areas where wetlands abound contain other critical natural resources. These areas are often those which the community wishes to protect from growth pressures. They are ripe for designation as critical environmental areas, sending areas under transfer of development rights programs, and rural land use districts under a community-wide smart growth program.

**New York**

The State of New York regulates the use of wetlands under the Freshwater Wetlands Act (“the Act”).<sup>1</sup> The Act sets out the State’s policy regarding the importance of these ecosystems and the restrictions intended to preserve them in the face of development pressures. The Act creates a structure to “regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state.”<sup>2</sup> The Act relies on the presence of vegetation as the critical indicator of a wetland. These types of vegetation include trees,<sup>3</sup> shrubs, rooted, and free-floating and wet meadow vegetation.<sup>4</sup>

The State protects wetlands that are 12.4 acres in size or larger, including a one hundred-foot wide buffer surrounding these areas. Smaller wetlands areas may be protected under the state law if the Department of Environmental Conservation (DEC) determines that they are of “unusual local importance.”<sup>5</sup> A wetland meets this test if it provides habitat for a threatened or endangered species provides flood control that protects a neighboring development area, or is hydrologically connected to a source of public drinking water. Once it is determined that an activity is regulated, the landowner planning on conducting the activity must obtain a permit from the DEC.<sup>6</sup>

A permit will be granted for an activity if: “1) it would be compatible with the preservation, protection and conservation of the wetland; 2) it would result in no more than an insubstantial degradation to any part of the wetland; and 3) when it would be compatible with public health and welfare.”<sup>7</sup> If these three tests, which are similar to those used at the federal level, are met, a permit may be issued with or without conditions. If not all three tests are met, or if the land use regulations characterize the proposed activity as “incompatible”, a permit may be issued only if the need for the

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<sup>1</sup> ECL Article 24 (1998).

<sup>2</sup> *See* ECL § 24-0103 (1998).

<sup>3</sup> Trees are included because many of the state’s wetlands are heavily forested.  
*See id.*

<sup>4</sup> *See* ECL § 24-0107 (1998).

<sup>5</sup> ECL §24-0107 (1998).

<sup>6</sup> ECL §24-0701(1).

<sup>7</sup> 6 NYCRR § 663.5(e)(1).

activity outweighs the loss of or detriment to the wetland. This “balancing test” varies in severity depending upon the class and benefits of each wetland.<sup>8</sup>

### **Local Assumption of Article 24 Authority**

The Act specifically allows local governments to participate in the regulation of freshwater wetlands.<sup>9</sup> It allows municipalities to replace DEC as the regulatory agency over wetlands larger than 12.4 acres. This may be accomplished by either enacting an ordinance “in such form and with such procedures” as the municipality determines to be appropriate or by adopting “the procedures and concepts contained in Article 24.”<sup>10</sup>

The local freshwater wetlands protection law must be at least as protective as the State Act and cannot affect the activities that are exempted under the act. Even if the municipality assumes jurisdiction under Article 24, the DEC retains the authority to supersede the local law if it determines that the local government does not have the technical capability to effectively carry out the mandates of the Act.<sup>11</sup> At least three local governments have assumed an actual delegation of exclusive jurisdiction under Article 24 from the DEC, those being the Town of Hempstead, the Town of Union, and the Village of Southampton.

### **Authority under the Municipal Home Rule Law**

The Municipal Home Rule Law authorizes local municipalities to adopt laws to protect the physical environment in the municipality.<sup>12</sup> Under this authority, municipalities may create separate, independent protection mechanisms for wetlands, including protections for those under 12.4 acres. Where localities choose to regulate state wetlands, the local government and the DEC enforce separate and distinct permitting authority over the same development proposals that affect those wetlands.

### **Connecticut**

In Connecticut, the state legislature has provided a unique system of wetlands protections that requires the State Department of Environmental Protection to create

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<sup>8</sup> See 6 NYCRR § 663.5 (e).

<sup>9</sup> See ECL § 24-0501 (1998).

<sup>10</sup> See *id.*

<sup>11</sup> See ECL § 24-0503.2.

<sup>12</sup> See Municipal Home Rule Law, Article 2, § 10(1)(ii)(a).

and supervise a locally-administered system of wetlands controls. State statutes establish a detailed system for the creation of an inland wetlands and water course protection regime that allows local wetland agencies significant control over development affecting wetlands and water courses, broadly defined.<sup>13</sup> Connecticut courts have consistently backed local governments when their wetlands regulations have been stricter than those administered by state agencies.

A wetland in Connecticut is defined as an area containing soil types “designated as poorly drained, very poorly drained, alluvial, and flood plain by the National Cooperative Soils Survey, as may be amended from time to time, of the Soil Conservation Service of the United States Department of Agriculture.”<sup>14</sup> A watercourse includes any body of water, whether natural or artificial, and whether privately or publicly owned.

Connecticut’s Inland Wetlands and Watercourses Act requires municipalities to appoint, by ordinance, an inland wetlands agency.<sup>15</sup> The agency regulates activities within wetlands designated by the municipalities. The Act prohibits anyone from conducting a “regulated activity” on any inland wetland or watercourse without a permit. Regulated activities include almost everything that is possible to do on or with land or water. There are a few specified exceptions. The Commissioner of the Department of Environmental Protection is required to adopt regulations that protect inland wetlands and watercourses. The Commissioner may revoke the authority of the local wetlands agency to regulate activity in the wetlands if it is determined, after a hearing, that the local agency has failed to perform its duties.<sup>16</sup> When the local regulations and the DEP’s regulations conflict, the more restrictive of the two will apply.

## **Wetlands Regulations – Reflections on the Federal System of Environmental Law**

This brief review of state and local wetlands protection systems provides an opportunity to reflect briefly on the nation’s system of environmental law, which is largely a creature of federal statutes passed beginning in the early 1970’s. The first step in this process was the adoption of the National Environmental Policy Act (NEPA) which established broad policy objectives. Congress, however, limited the substantive effect of NEPA to requiring federal agencies to conduct environmental impact studies before taking actions, initiating projects, or making recommendations that might have a significant adverse impact on the environment.

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<sup>13</sup> CONN. GEN. STAT. § 22a-36 et. seq.

<sup>14</sup> CONN. GEN. STAT. §§ 22a-38(15) and (16).

<sup>15</sup> CONN. GEN. STAT. §§ 22a-36 through 22a-45.

<sup>16</sup> CONN. GEN. STAT. § 22a-42(d).

Reaching beyond the actions of federal agencies and dictating what state and local governments must do to protect the environment is limited by the scope of federal power and the political reality of states' rights. Congress is authorized to pass laws that regulate matters affecting interstate commerce, which has been defined broadly by the courts. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, S.Ct. 1981, the U.S. Supreme Court recognized that the power to regulate interstate commerce is "complete in itself." It may be exercised to its "utmost extent, and acknowledges no limitations other than prescribed in the constitution."

The Tenth Amendment's provision that "all (power) is retained (by the state) which has not been surrendered," historically has not restrained the expansion of federal power over matters affecting interstate commerce. It has been a political brake on laws affecting the authority of states and local governments over land use control and has been resurrected recently by the Supreme Court as a substantive law limitation.

Turning back to wetlands protection and the broader matter of water quality protection, Congress adopted a federal statute in 1972 aimed at the total elimination of pollutant discharges into navigable waters by 1985. The Federal Water Pollution Control Act, popularly called the Clean Water Act, was designed to protect the ecological stability of surface water systems by regulating the discharge of pollutants into navigable waters. Under the controls imposed by this Act, tremendous progress has been made in eliminating the sources of water pollution through the regulation of point source pollution. Point source pollution includes discharges emanating from pipes, ditches, channels, conduits, containers, and some discrete facilities such as livestock feeding operations and marine vessels.

A permitting system is created by the Clean Water Act. It is known as the National Pollutant Discharge Elimination System (NPDES). Every operator of an existing point source of discharge and of proposed new sources must apply for a NPDES permit. The Act permits state governments to assume control of this system by adopting State Pollutant Discharge Elimination Systems (SPDES). This requires the state to show that it has a control and permit system that is at least as restrictive as the NPDES system. This dual system exhibits an approach to environmental protection that may be called "cooperative federalism." It recognizes the legitimate role and responsibilities of states in these matters and defers to states that can demonstrate the ability to protect the national interests in these matters as expressed by environmental laws adopted by Congress.

The Clean Water Act's approach to wetland protection is to give the Army Corps of Engineers and the Environmental Protection Agency cooperative authority to issue permits and establish regulations regarding the elimination or degradation of wetlands by private and public landowners and parties. Section 404 of the Clean Water Act makes it unlawful to discharge dredge or fill material into the waters of the United

States without a Corps permit. In its regulations, the Corps defines waters of the United States to include wetlands that “are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support...a prevalence of vegetation typically adapted for life in saturated soils conditions.” Under the federal system the Corps issues permits but the EPA has the authority to develop guidelines for permit issuance and to veto certain Corps issued permits.

States, such as Connecticut and New York, have also used their police powers to establish wetlands protection permit systems which operate separately from the federal system. Federal environmental law bears several characteristics that distinguish it from local land use control delegated by state legislatures. The federal statutes tend to focus on the elimination of discrete and separate problems. They attack air pollution or water pollution or the dangers of solid waste disposal. Federal statutes regulate particular industries, such as pesticide manufacture and use. Second, industries and polluters are regulated by a single set of standards of national applicability. Third, control is achieved through a system of permit requirements that change depending on the type of pollution or waste involved. Sometimes these controls are administered by federal agencies, such as wetlands permits, and sometimes by state agencies that certify they will protect federal interests, such as pollution discharge permits. The federal system is defined as a “command and control” system that mandates compliance with national standards, using these permit and other enforcement mechanisms.

Evident in the debates regarding the adoption of federal environmental controls is the notion that the Congress does not intend, in all but extreme cases, to usurp state and local control of land use. This has prevented any significant attempt to integrate the obvious land use impacts of wetlands and pollution discharge control systems with local land use regimes. In fact, the federal environmental pollution control system and the local land use control mechanism are two independent legal structures that affect many common matters without paying conscious attention to whether and how they might interrelate.

The local system is built around zoning districts and bulk and area regulations, not intended originally to protect the environment, but to create a well-designed, efficiently operating, and balanced community. Fire protection and traffic safety were more on the minds of the designers of zoning and land use standards than the protection of the local environment. With the advent of local wetlands protection laws, floodplain protections, steep slope and viewshed overlay districts, and a host of local “environmental laws,” the lines between the objectives of federal environmental law and local zoning controls has become less discrete and distinguishable.

Among the many benefits of the current emphasis on smart growth may be added the opportunity to begin this process of integrating the federal, state, and local roles in environmental protection.