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## **Wetlands Controls: Untangling an Intricate Web of Rules**

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**Abstract:** This article discusses the controversy surrounding legislation protecting wetlands, including the proposed revisions to National Wetlands Permit Number 26. Federal, state, and local governments all play a critical role in wetlands regulation. The potential of these different levels of government can be maximized through a coordinated effort, avoiding situations where applicable laws from one level of government run contrary to laws of another level of government, which often results in unnecessary litigation. This article discusses these issues, and also provides examples of intergovernmental wetlands regulation success.

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### **Current Wetlands Controversy**

Environmentalists and land developers are focussing much of their energy this month on National Wetlands Permit Number 26. By August 31st, they must let the U.S. Army Corps of Engineers know what they think of the proposed revisions to "NWP No. 26," which is one of several national permits that allow expedited review of projects that the Corps has determined have minimal impact on wetlands. Environmentalists are concerned that the revisions violate President Clinton's Clean Water Action Plan to achieve an annual net gain of 100,000 acres of wetlands by 2003. In *National Association of Home Builders v. U.S. Army Corps of Engineers* (Civ. No. 97-00464(SS)), developers have challenged NWP No. 26 as too restrictive.

This issue is one of many arising from the intricate web of regulatory controls designed to preserve the nation's threatened wetlands. A particular development project may trigger the wetlands jurisdiction of up to three levels of government and involve reviews and approvals of over a half dozen administrative agencies. What is allowed by one level of government may be prohibited by another and how wetlands are regulated by one agency may differ significantly from how they are controlled by another.

Much of the attention paid to wetlands regulations, in the literature and case law, is aimed at the federal and state wetlands protection regimes. Less understood is the critical role played by local governments in the regulation of development activities generally, and, increasingly, in the regulation of wetlands. By understanding the regulatory systems at all three levels of government, the need for coordination can be appreciated.

## **The Intricate Web of Wetlands Regulation**

Nearly all types of construction and development activities regulated by local land use laws may also be regulated under applicable federal, state, or municipal wetlands laws. If the construction of a home or residential subdivision, commercial store or strip mall, extension of a driveway or road, the addition of a room, garage or tennis court, or the placing of any impervious surface on the land impacts a regulated wetland, it may not proceed unless the landowner receives a wetlands permit. In addition to this permit, the landowner must also receive approval under any applicable local regulations such as those governing land subdivision, site plan development and the award of special permits or variances.

Where a proposed project impacts wetlands regulated by local, state and federal laws, permits must be obtained from the local wetlands agency, the state Department of Environmental Conservation (D.E.C.), and the Army Corps of Engineers. The difficulty this causes applicants is apparent in the significant differences in processes, personnel and wetlands provisions encountered in seeking permits at three separate levels of government. A review of local, state and federal wetlands laws reveals critical differences in how wetlands are identified, what sizes of wetlands regulated, types of activities regulated and exempted from regulation, whether or not wetland “buffer areas” are regulated, what standards may be waived and how variances are awarded.

## **Federal and State Regulations**

The federal Clean Water Act gives the Army Corps of Engineers and the Environmental Protection Agency the authority to promulgate rules regulating wetlands throughout the nation. The federal definition of wetlands is broad, based on the presence of water saturation, wetlands vegetation or certain types of soils. The federal law regulates wetlands of all sizes including those less than an acre in area. If a wetland’s health may affect the viability of navigable waters or harbor migratory birds, it may be subject to federal regulation. Federal law regulates the wetlands themselves, not buffer areas around the wetlands unless a proposed activity on an adjacent area directly affects dedicated wetlands.

The Freshwater Wetlands Act, adopted by the New York State Legislature, gives the D.E.C. authority to regulate wetlands that are 12.4 acres or larger and smaller wetlands that are of unusual local significance. The Freshwater Wetlands

Act and the D.E.C. Commissioner's regulations define wetlands mainly by the presence of types of vegetation typically found on wetlands and buffer areas within 100 feet of the wetlands' boundary.

## **Local Wetlands Regulation**

Local governments have authority to regulate wetlands under two separate sources of authority. Under the Freshwater Wetlands Act, they may adopt wetlands regulations at least as restrictive as the state's, demonstrate their competence to administer their regulations, and then replace D.E.C. as the regulator of wetlands within their jurisdiction. (*Article 24, § 24-0501 of the State Environmental Conservation Law*) When this happens, only the local government regulates wetlands within its borders. Very few localities in New York have elected this option. Most local wetlands laws are adopted pursuant to the Municipal Home Rule Law which authorizes local governments to adopt laws to protect the "physical environment." (*Subsections 10(1)(ii)(a)(11) and (12) of the Municipal Home Rule Law*) Under their home rule authority, localities may adopt wetlands laws that contain more inclusive definitions of wetlands, regulate larger buffer areas, and cover a more extensive range of activities than the D.E.C. regulations promulgated under the Freshwater Wetlands Act. When localities use their home rule authority to regulate local wetlands, for example, they typically regulate smaller sized wetlands than the D.E.C. If they wish, they also may regulate wetlands 12.4 acres in size or larger but only if their regulations are at least as protective of wetlands as the state program. (*Article 24, § 24-0509 of the Environmental Conservation Law*) When localities chose to regulate wetlands under their home rule authority, their regulations are concurrent with those of the D.E.C. and landowners must comply with both sets of standards separately, as well as any applicable federal permit.

## **Examples of Local Wetland Regulation**

The Town of Kent in Putnam County adopted its Freshwater Wetlands law in 1988 as Chapter 103 of its Municipal Code. It was adopted "to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom." The town's law regulates contiguous wetlands covering at least 40,000 square feet, approximately one acre, that are identified by water saturation during at least three consecutive months or by the presence of aquatic or semiaquatic vegetation.

Kent's wetland law regulates a number of activities including erecting or enlarging any structure of any kind, road construction, digging of wells, installation of septic tanks, sewage treatment effluent discharge, draining, dredging, excavation, any form of deposit or storage of any material, use of off-road vehicles, tree and brush cutting, and "any other activity which substantially impairs any of the several functions served by wetlands ... "

Under this local law, any person proposing to undertake a regulated activity must file an application for a permit. When a regulated activity also requires a land use application to the Town Board, Planning Board or Zoning Board of Appeals, that body is given jurisdiction over the wetlands application to issue or deny the wetlands permit. Referral by these approving authorities to the local Wetlands Inspector and Conservation Commission for their review and written report on the matter is required. This referral can take no longer than 30 days and inaction by the inspector and commission during this period is deemed to indicate no objection to the application. Public hearings on the wetlands permit application are held in conjunction with any public hearing required for any other land use approval that the regulated activity requires. Similarly, under this approach, any environmental review of the wetland impact of the proposed project required under the State Environmental Quality Review Act is conducted by the same agency that is charged by the Act with reviewing all other environmental impacts of the proposed project.

The Kent law contains a list of standards to be used in determining whether to approve, condition or deny a permit application. These include the environmental impact of the proposed activity, the suitability of the activity in the area, alternatives to the activity, and “the extent to which the exercise of property rights and the public benefit derived from [the activity] may outweigh or justify the possible degradation of the wetland.”

The provisions of the wetlands law of the Town of Bedford in Westchester County differ from those of the Town of Kent in several ways. The law applies to wetlands of all sizes, no matter how small. Wetlands are defined primarily by the presence of hydric soils and/or lands saturated by water in a way that is sufficient to support a prevalence of hydrophytic vegetation, which is extensively defined. The Bedford law regulates activities to be conducted in wetland buffer areas within 100 feet of their boundaries. All permits are submitted to a Wetlands Control Commission consisting of five resident members with qualifications in wetlands related matters. All decisions on wetlands permit applications are made by this Commission and all environmental reviews required by the State Environmental Quality Review Act are conducted by it, whether or not the regulated activity is subject to review by another local land use agency. Public hearings may be held by the Commission in its discretion.

The law indicates that applicants also have the responsibility of obtaining all other “approval or permits required by any other agencies prior to construction in accordance with the wetlands permit.” Obtaining such approvals is the responsibility of the applicant and no activity may be started until all required approvals are obtained.

## **Need for Coordination**

In *Ardizzone v. Elliott*, 75 N.Y.2d 150, 550 N.E.2d 906, 551 N.Y.S.2d 457 (1989), the Court of Appeals invalidated a wetlands protection ordinance adopted by the Town of Yorktown that did not conform to the requirements of the State's Freshwater Wetlands Act. This holding prevented local governments from enacting independent legal regimes under their home rule authority that operate concurrently with the state wetlands control system. The state legislature reversed *Ardizzone* in 1990, when §24-0509 of the Environmental Conservation Law was amended to allow concurrent jurisdiction over wetlands between the D.E.C and local governments.

As a result of this post-*Ardizzone* amendment, the review and approval process of development proposals can be inordinately complex. Lack of coordination can occur at the local level, between local land use agencies and wetlands boards. It can occur between the local land use or wetlands regulations and state or federal wetlands controls. It can occur between the state and federal regulatory systems.

This can result in situations where, after a long and complex process, a landowner can secure a state wetlands permit with no assurance that the regulated activity will be permitted locally, either under basic land use controls or wetlands regulations. For example, in *Honore De St. Aubin v. Flacke*, (68 N.Y.2d 66 (1986)), state tidal wetland regulations, which are similar to freshwater regulations, directly collided with local land use practice. On 80% of the landowner's 103 acre tract no development was permitted by state wetlands regulations. The D.E.C., however, would permit 52 two-family homes to be clustered on the upland acres, effectively preventing a regulatory takings challenge by the landowner against the state. In fact, the court decided that no taking occurred, because of the development allowed by the D.E.C. on the upland area. This created a practical problem for the owner because the town's land use regulations did not allow clustering and its zoning did not allow two-family housing.

## **Conclusion**

While the attention focussed on National Wetlands Permit 26 is certainly merited, in the grander scheme of wetlands policy more attention needs to be devoted to developing effective methods of coordinating wetlands and local land use regulations. One step in this direction has been taken at the state and federal level. For activities that affect state and federally regulated wetlands, the Army Corps of Engineers has agreed to receive a copy of the application submitted by the landowner to the D.E.C. as the application it requires, avoiding the submission of separate applications to the two agencies. At the local level, some communities, like the town of Kent, have coordinated the local wetlands review process with the land use process by delegating wetlands permit authority to the

local board that has authority over subdivision, site plan, special permit and rezoning applications that impact wetlands as well. These are important, but only small, steps in a longer journey toward regulatory coordination that needs to be taken.