

**ENVIRONMENTAL REGULATIONS AFFECTING LAND USE**

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### **I. INTRODUCTION**

The focus of this ICLE program is on zoning, but obtaining an appropriate zoning classification is only one of a number of regulatory hurdles in the development process. This paper is intended to be a primer on other environmental regulations that are applicable to the development of property. Of course, there are a tremendous number of environmental regulations which may potentially affect any given project, far too many to discuss within the scope of one seminar. This presentation is limited to a discussion of several provisions of federal, Georgia and local government environmental regulations that are likely to be relevant to properties in the region surrounding Columbus.

### **II. FEDERAL ACTS AND REGULATIONS**

There is a myriad of Federal environmental regulations, but many are aimed at regulating industry conduct such that they are unlikely to confront most Georgia property owners. Two that will apply during the development of many properties are the Clean Water Act and the Endangered Species Act.

A. The Clean Water Act (33 USC §§ 1251 to 1387)

The Clean Water Act is the federal environmental regulation most likely to affect any given development of land. It has a number of provisions, but the two most relevant to the development of land are the wetlands protections and the national pollutant discharge elimination system (NPDES) permit requirement.

1. Wetlands

Section 404 of the Clean Water Act (33 USC § 1344) regulates wetlands.

Wetlands serve five essential functions: 1) they serve to control and slow flooding; 2) they help to recharge groundwater aquifers; 3) they clean and purify water by allowing toxic materials, excess nutrients and sediments to settle out; 4) they provide crucial habitat for wildlife such as migratory birds; and 5) they provide recreation. Section 404 requires any person desiring to dredge or fill a navigable water of the United States to acquire a permit from the Army Corps of Engineers. The Environmental Protection Agency has concurrent jurisdiction; it is responsible for promulgating regulations pertaining to the issuance of permits. Section 404(c) provides that EPA also has authority to veto the issuance of permits where it determines that “the discharge... will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas.”

Interestingly enough, § 404 does not use the term wetlands; however, in what has been a continuous battle throughout the federal courts, the Corps has construed § 404 to give it jurisdiction over wetlands and other bodies of water that are not themselves

navigable. The Corps originally considered its jurisdiction to regulate navigable waters restricted to waters that were actually navigable, but that changed after Natural Resources Defense Council v. Calloway, 392 F.Supp. 685 (D.D.C. 1975), where the court held that Congress had intended to extend Corps' jurisdiction "to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability." Id. at 686.

The Supreme Court approved that expansive view of the Corps' jurisdiction in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), where a developer challenged the permit requirement in regards to an 80-acre non-navigable marsh that was adjacent to a navigable stream. The Court discussed the fact that the boundary between water and land is not always evident or constant, and that the principal purposes of the Clean Water Act would be difficult to achieve if the wetlands that filter impurities out of water entering navigable water bodies were not subject to regulation. The Court described the § 404's use of the term navigable as "of limited import," and gave great deference to the Corps as the agency charged with implementing the Act. Id. at 133. This case is normally relied on for the proposition that the Corps has jurisdiction over wetlands adjacent to navigable waters.

The most recent Supreme Court decision to address this issue is Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001), commonly referred to as SWANCC. In that case, the Corps sought to exercise jurisdiction over an isolated and abandoned sand and gravel pit under the theory that it

provided habitat for migratory birds. It was apparently undisputed that the water in the pit did not affect any navigable waters. In a 5-4 decision, the Supreme Court held that in order to find that Congress intended § 404 to give the Corps jurisdiction over such an isolated water body, it would have to assign no meaning to the term navigable in the statute. Therefore, the Corps' jurisdiction is broad, but not so broad as to reach waters that have no effect on navigable water bodies. This case appears to stand for the proposition that the Corps may not regulate isolated wetlands.

The District Court for the Middle District of Georgia recently applied these decisions in the case U.S. v. Jones, 267 F.Supp.2d 1349 (2003). This case began with a random EPA inspection of a Georgia oil company; the inspector discovered an oil leak that flowed off site into a storm drain. The storm drain lead to a ditch that emptied to wetlands adjacent to the Ocmulgee River, one to two miles away. EPA eventually spent over \$2.5 million cleaning up the mess, and brought this recovery action against the oil company and its owner, seeking civil penalties under the Clean Water Act and another federal act that also applies to navigable waters. Id. at 1353. The defendants argued that they were not liable because, under SWANCC, they had not discharged into a navigable water. The court chose not to interpret the SWANCC decision so strictly, finding that the Supreme Court only held that there had to be a nexus between the water body in issue and a navigable water. Because the storm drain and ditch were essentially man-made tributaries of the Ocmulgee River and its adjacent wetlands, the Court held that the defendants had discharged into the navigable waters of the U.S. Thus, though

U.S. v. Jones does not involve the Corps seeking to exercise jurisdiction under § 404, it is a good indication that local federal courts will still tend to give the Corps expansive authority to regulate wetlands.

What then is a wetland? The Corps answers that question by reference to its 1987 Wetlands Delineation Manual.<sup>1</sup> The Manual refers back to the Corps and EPA's joint definition for wetlands:

Those 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 Corps breaks this determination down into three factors. First, the Corps looks at the *vegetation* to determine whether the "prevalent vegetation consists of... species... [that] have the ability to grow, effectively compete, reproduce, and / or persist in anaerobic soil conditions." Second, the Corps considers whether *soils* that have been classified as hydric are present. Third, the Corps looks at *hydrology*: whether "[t]he area is inundated either permanently or periodically..., or the soil is saturated to the surface at some time during the growing season of the prevalent vegetation." For each of these factors, the Manual provides a list of indicators that is used to determine

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<sup>1</sup> The current edition of the 1987 Wetlands Delineation Manual is available in Adobe .pdf form at the Corps' website:

[www.saj.usace.army.mil/permit/documents/87manual.pdf](http://www.saj.usace.army.mil/permit/documents/87manual.pdf).

whether the present conditions are typical of wetlands. Generally, "evidence of a minimum of one positive wetland indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland determination." (1987 Wetland Delineation Manual, pg 9-10)

The Manual also provides the process that the Corps follows to determine whether a given property contains wetlands. Initially, the Corps looks at available data such as USGS quadrangle maps, the wetlands maps maintained by the National Wetlands Inventory<sup>2</sup>, soil surveys and local knowledge. The Corps uses this information to determine whether an onsite inspection is necessary, and whether a routine or comprehensive determination will be required. (*Id.* at 35 *et seq.*) Having determined whether or not wetlands are present, the question then becomes whether or not an individual § 404 permit will be required.

Section 404(e) allows the Corps to issue general permits on a nationwide or regional basis when it determines that a certain type of activity will "cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." Pursuant to regulations codified at 33 C.F.R. §§ 330.1- 6, the Corps has issued a number of Nationwide Permits that exempt certain land disturbing activities from requiring individual § 404 permits when

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<sup>2</sup> The United States Fish & Wildlife Service maintains a website that allows users to create maps that contain the currently existing digital data from the National Wetlands Inventory: [www.wetlands.fws.gov/mapper\\_tool](http://www.wetlands.fws.gov/mapper_tool).

performed on a small scale. Nationwide permits have been issued for a variety of land disturbing activities, including residential, commercial and institutional development; agricultural activities; and even mining. Most of the Nationwide Permits only apply if less than 1/2 acre of wetlands will be affected. Activities resulting in a loss of 1/10 of an acre or more still require the filing of a detailed notice of intent to operate under the general permit with the Corps' District Engineer prior to the construction. Normally, activities subject to a Nationwide Permit affecting less than 1/10 of an acre will only require the filing of a report after the work is completed. There are a number of general conditions that apply to all of the Nationwide Permits; for example, permitted activities should avoid waterfowl breeding areas and shellfish beds, should not impair navigation, and must not harm endangered species. Also, the District Engineer may require mitigating actions to offset the effect of the permitted activities. Each Nationwide Permit also has conditions particular to the subject activity. The Corps has the authority to modify the Nationwide Permits for each District, and also to issue Regional Permits; for example, in Georgia a Regional Permit exists for the dredging of certain private recreation ponds less than 5 acres in size. The currently applicable Nationwide Permits can be found in the Federal Register at 67 Fed. Reg. 2020 (January 15, 2002).<sup>3</sup>

When no Nationwide or Regional Permit is applicable, an individual § 404 permit application will be required. The applicant must show the following:

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<sup>3</sup> This document may be viewed online, along with other Corps regulatory materials applicable to this District, at [www.sas.usace.army.mil/permit.htm](http://www.sas.usace.army.mil/permit.htm).

- 1) there is no practical alternative that will have less adverse impact,
- 2) no statutory violations will occur,
- 3) there will be no significant adverse impacts, and
- 4) all reasonable mitigation measures will be employed.

See 40 CFR 230.10. The regulations presume that if the desired activity is not water dependent, then a practical alternative exists; the applicant bears the burden of showing otherwise. After the application is filed, the Corps issues public notice of the application, accepts comment, and may conduct a public hearing. The Corps then evaluates the application and issues an Environmental Assessment and Statement of Finding which determines whether or not the application meets the requirements for the issuance of the permit. See 40 C.F.R. § 230.12.

There are two procedures available to persons dissatisfied by the Corps' permit decision; there is no administrative review process in § 404, so both procedures involve federal court. The applicant whose permit is denied may appeal under the Administrative Procedure Act, 5 USC § 701 *et seq.*. Normally, this involves a review of the administrative record, rather than de novo review. This process is comparable to the procedure that would be invoked in state court by an applicant who was denied a variance by a local government board of zoning appeals; the applicant will only be successful if the permit decision is found to be arbitrary and capricious. The other procedure to challenge the permit decision is provided by the citizen suit provision of the Clean Water Act, § 505, and would normally be invoked by persons dissatisfied with

the grant of the permit. Section 505 allows citizens to bring action against the government agencies for failing to conduct non-discretionary duties, similar to a state court mandamus action. Again, the permit decision itself would only be reviewed under the Administrative Procedure Act and the arbitrary and capricious standard would apply. Thus, it is essential that both the applicant and opposed citizens make their case to the Corps, and timely file their evidence so that it is included in the agency record.

## 2. NPDES Permits

Another permit that will likely be required for any development is the NPDES permit, under § 402 of the Clean Water Act, 33 USC § 1342. NPDES stands for the National Pollutant Discharge Elimination System. Despite the fact that the title says pollutant discharge elimination, the NPDES is really a license to pollute. The NPDES permit sets effluent limitations, which are parameters of how much of a given pollutant a source can release into surface water without negatively affecting the quality of the water.

In order to obtain an NPDES permit, the applicant must certify that it will comply with the Water Quality Standards contained in § 401 of the Act. Section 401 requires the applicant to comply with the various provisions of Title III of the Act, which include a prohibition on non-permitted discharges. Thus, the applicant certifies that it will not make any discharge except those allowed by the NPDES permit. The NPDES permit acts as a permit-shield; so long as the applicant complies with its NPDES permit, it will be deemed to be in compliance with the Act. The applicant is required to file discharge

monitoring reports, which are open to the public and can be used by the EPA and plaintiffs in § 505 citizen suits to prove violations of the NPDES permit and the Clean Water Act.

The NPDES permit requirement does not just apply to discharges of materials commonly understood to be pollutants such as mercury and solid waste. In 1987, § 402 of the Clean Water Act was amended so that it also applies to storm water discharges from municipal, industrial and construction activities. EPA has delegated its authority to issue NPDES permits in Georgia to the Environmental Protection Division, which oversees this program pursuant to rules and regulations adopted under the Georgia Water Quality Control Act. Georgia's oversight of the NPDES system will be discussed further below.

B. The Endangered Species Act (16 USC § 1531 *et seq.*)

Most lawyers will have at least a passing familiarity with the case Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), where environmentalists challenged a billion-dollar TVA dam project that was nearing completion because it would likely lead to the extinction of a small fish called the snail darter. Griffin Bell, who at that time was the Attorney General, argued the case before the Supreme Court on behalf of the TVA. As the story goes, at oral argument Judge Bell waived a snail darter preserved in a jar of formaldehyde, and asked the Court whether Congress, in adopting the Endangered Species Act, really intended to block such massive public works projects on account of such a small fish. The answer from the Court was an unequivocal yes. After considering

the language and history of the Act, the Court wrote: "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities... ." 437 U.S. at 194.

The Endangered Species Act, 16 USC §§ 1531 *et seq.*, was adopted in 1973 in recognition of "the aesthetic, ecological, educational, historical, recreational scientific value" of biodiversity, and to address the rampant extinction of species caused by human activities. 16 USC § 1531(a). The Act commands the Fish and Wildlife Service to list species that are endangered or threatened. See 16 USC § 1533(a). Listed species are protected by a prohibition on activities that result in their taking. See 16 USC § 1538(a). As a practical matter, it is irrelevant whether a species is designated as being threatened or endangered; the protections and required procedures are the same. The key word is *take*, which has a very expansive meaning under the Act: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." See 16 USC § 1532(19). Most any activity that negatively affects a threatened or endangered species will be considering a taking under the Act. The Act also provides protection for the critical habitat of listed species, because the destruction of critical habitat will likely harm that species.

What then must a person do upon discovering an endangered species on a property that he plans to develop? The obvious initial answer is that he must not *take* it; the Act provides severe civil and criminal penalties for illegal takings. See 16 USC § 1540. However, the Act does give the Secretary of the Interior the authority to allow

*incidental takes*, which are takings that occur as a result of otherwise legal activity, such as development. In order to obtain a permit for an incidental taking, an applicant must file a conservation plan that specifies the likely impact from the taking, the steps that the applicant will take to minimize and mitigate the taking, and alternative actions that the applicant considered but which are not being utilized. See 16 USC § 1539(a). The Secretary of the Interior may issue the permit upon making a finding that the taking will be incidental, that the applicant will minimize and mitigate the impact of the taking to the maximum extent possible, and that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. See id. Note also that there are special and additional requirements when the taking will be conducted by or in conjunction with a federal agency. See 16 USC § 1536.

### **III. GEORGIA REGULATION- THE IMPLEMENTATION OF THE NPDES PROGRAM**

Title 12 of the Georgia Code is almost solely made up of statutory provisions that are intended in one way or another to regulate Georgia's environment, and there are far too many such statutes to comprehensively discuss here. Therefore, this discussion is limited to a continuation of the previously discussed NPDES system under Georgia law, and specifically storm water permits that are required for most developments in Georgia.

The Georgia Water Quality Control Act empowers the Georgia EPD to perform the regulatory role delegated by the EPA pursuant to the Clean Water Act in regards to the issuance of NPDES permits. See OCGA § 12-5-30. The EPD has further clarified its role in regulations codified at Chapter 391-3-6-.15 & .16 of the Georgia Administrative Code. Under these regulations, a permit is required for any person conducting land disturbing activities of greater than one acre, because of the storm water runoff and sedimentation that normally results from such activities.

The EPA has previously issued *stand alone, infrastructure* and *common development* general storm water permits for construction activities greater than 1 acre.<sup>4</sup> The type of development will determine which of the general permits will be applicable. Rather than applying for the permit, the developer files a Notice of Intent to operate under the applicable general permit. Where a subdivision is being developed with a developer and individual builders, the developer would be a primary permittee and each individual builder would be a secondary permittee. Along with the Notice of Intent, the developer must file an Erosion, Sedimentation and Pollution Control Plan which certifies the best management practices that will be used at the site and provides for inspections and sampling.

The general permits place conditions on the development activity, such as best management practice monitoring, rainfall recording, and storm water sampling.

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<sup>4</sup> This general permit can be found at the EPD's website at [www.dnr.state.ga.us/dnr/environ](http://www.dnr.state.ga.us/dnr/environ).

Recorded data is then submitted to the EPD on a monthly basis. The general permits contain limits on the allowable turbidity in streams downstream from the development, depending on whether or not the stream is a trout stream. Turbidity is essentially a measurement of a stream's sedimentation. When the development is completed and the site is stabilized, the developer must submit a Notice of Termination.

Just as with the NPDES permit under the Clean Water Act, the storm water permit should act as a permit-shield so long as the development is in compliance with the terms of the general permit. Further, as is the case with the EPA under the Clean Water Act, the EPD has the authority to delegate its responsibilities to *local issuing authorities*, which generally means local planning and zoning offices.

#### **IV. LOCAL GOVERNMENT REGULATION**

While the Corps of Engineers, EPA and EPD are generally thought of as the agencies that oversee environmental regulation, it is often the local authorities that do the legwork and actually enforce erosion control and other environmental protections. Therefore, it is always important to consider the ordinances that are applicable in the current jurisdiction. While space does not allow for a discussion of the content of the following ordinances, it is worth reviewing the ordinances that some of the local

governments in the Columbus region use to protect their environment. These ordinances are generally representative of ordinances in use throughout Georgia.<sup>5</sup>

A. Columbus / Muscogee County

Columbus / Muscogee County has a fairly comprehensive set of environmental regulations for a Georgia local government. It has a Wetlands Protection Ordinance, which ensures that any property under consideration for development gets referred to the Corps of Engineers before any permits are issued. A Groundwater Recharge Protection ordinance regulates underground storage tanks and development density in a recharge overlay district. A Water Supply Watershed Protection Ordinance regulates hazardous waste facilities near Lake Oliver. Columbus has a Floodplain Ordinance that regulates development in the floodplain. There is a Soil Erosion and Sedimentation Control Ordinance and a Stormwater Management Ordinance, which regulate these issues in addition to or in conjunction with the State and Federal regulations discussed above. Finally, Columbus / Muscogee County has a Tree Preservation and Replacement Ordinance that regulates the cutting of trees during the development process.

B. Harris County

Harris County is representative of a suburban Georgia county that is now experiencing development pressure from commuters. It has a Wetlands Protection District that is intended to alert developers, property owners and officials that a new

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<sup>5</sup> The following ordinances, along with ordinances for many cities and counties throughout Georgia, can be found at [www.municode.com](http://www.municode.com).

development may affect wetlands and requires Corps approval before local government development permits will issue. The County also has an ordinance and overlay district protecting the Chattahoochee River corridor. Harris County has a Soil Erosion and Sedimentation Control Ordinance, but does not appear to regulate storm water runoff at this time. Harris County has two ordinances aimed at preventing flood damage.

## **V. CONCLUSION**

Because this paper has covered only a few environmental regulations, and only then on a basic level, it would be easy to say that no real conclusion can be drawn. Nevertheless, it should be evident that there is a vast array of environmental regulations with which a property owner considering development, or his attorney, should have at least a passing familiarity. Those environmental regulations may be applied by federal, state or local authorities, or a combination thereof, or even a combination of agencies at the same level. It is hoped, then, that this paper has lifted the regulatory fog a little, and pointed out issues that the practitioner can be prepared to address.