

WETLANDS REGULATIONS AND THEIR IMPACT ON LAND UTILIZATION

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During the past few decades, the common perception of wetlands has changed from considering them virtually useless to the present view that they are critical to the well-being of the environment. Congressional acts to protect the Nation's waters have been construed by regulatory agencies and the courts to extend to any wetland, regardless of ownership or quantifiable relationship to publicly owned water bodies. This set of circumstances can be very important to the intensification of land use for agriculture, particularly in Florida where large areas of wetlands lie within private lands which are steadily increasing in market value. It is the purpose of this paper to point out the status of wetlands regulations, showing the impact they might have on individuals who are considering changes in use of their lands.

Federal jurisdiction over wetlands has come about through a series of laws and court rulings. The first congressional act, and many subsequent acts addressed "dredge and fill" activities in "navigable waters." The terminology in quotes can be found in most dictionaries by any literate citizen and a fairly clear understanding of congressional intent would be assumed. Court interpretations of these terms has been interesting. A brief history follows.

The Rivers and Harbors Act of 1899 was the first piece of legislation to address dredging and filling in navigable waters. This Act is administered by the Corps of Engineers and for decades it was used to protect navigability. In 1958, the U.S. Fish and Wildlife Coordination Act required a review of dredging projects by the Fish and Wildlife Service, bringing wildlife protection into dredge and fill assessment, in navigable waters. The National Environmental Policy Act of 1969 brought an assessment of all environmental impacts of dredge and fill projects.

The Federal Water Pollution Control Act of 1972 further broadened the guidelines for regulating dredge and fill activities in navigable waters, but did not expressly include wetlands. A 1975 court case (Natural Resources Defense Council vs. Callaway) brought wetlands under the Act and caused the Corps of Engineers to phase in broadened jurisdiction, extending their permitting authority as of July, 1976, to primary tributaries of navigable waters, lakes larger than five acres, and adjacent wetlands, and as of July, 1977, to other waters up to headwaters flowing at five cubic feet per second or more. During this transition, "navigable waters" became "waters of the United States." The regulatory authority still addressed "dredge and fill" activities.

In 1977, Congress amended the dredge and fill section (404) of the 1972 Act, and agriculture, silvaculture, and conservation practices were exempted from dredge and fill regulations. Soon thereafter, a case involving the clearing of bottomland hardwoods in Louisiana led to a court ruling

that collecting, gathering, and transporting cut down trees across a bottom-land hardwood wetland constituted a discharge of material dredged from U.S. waters. Subsequently U.S. Attorney General, Benjamin Civiletti, issued an opinion that the Environmental Protection Agency has ultimate authority in determining the jurisdictional scope of waters of the U.S..

This chain of events has resulted in a situation where any contemplated activity in a wetland should be planned with the awareness that a permit may be required, and if public interest requires hearings, the permit may be delayed for many months or even denied. With the prevailing definition of a wetland being an area of land inundated with sufficient frequency to support the growth and reproduction of wetland vegetation, substantial acreages in private ownership fall into this category.

Two cases involving the alteration of wetlands for agriculture in Florida point out problems that can arise. In one case, a large tract of unimproved range was to be drained and planted with improved pasture grasses. Inquiry to the Corps of Engineers brought approval to proceed with the plan. Work was begun and arrangements were made to schedule a large herd of beef animals onto the land as pastures became available. Several "interested" citizens observed the operation and petitioned to have it stopped, resulting in a cease and desist order being issued by the Corps. Subsequent hearings and delays required the rental of pastureland for the incoming beef herd. The project was ultimately resumed after more than a year's delay.

The other case involved the opening of land in Southwest Dade County by rock plowing - a practice common in this area. Because this type plowing permanently alters the consistency of the soil and vegetation, the operation was stopped by the Corps of Engineers as not being a normal farming operation.

It is not the purpose of this paper to criticize wetlands regulations. On the other hand, it is important to Florida agricultural producers to realize that these regulations have been extended well beyond what the language of the enabling legislation would indicate to the average reader. This extended authority, and the sensitivity of regulatory agencies to vocal, well organized pressure make the landowner's position uncertain even after an initial disclaimer of jurisdiction is issued.

During recent sessions of Congress, bills have been introduced to amend the dredge and fill provisions of the Federal Water Pollution Control Act to restrict regulation to waters that are navigable, in fact. These bills have narrowly missed passage. This year, similar amendments have been introduced. It may be in the best interests of agricultural producers who own wetlands to investigate these efforts to clear up some of the uncertainties surrounding the language of the law and the meaning of the law as construed by the regulatory agencies and the courts.

References Used

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