

Federal Wetlands Update By Douglas B. Eldred, P.E.

In the SWANC decision of February 2001, the US Supreme Court ruled that the US Corps of Engineers does not have jurisdiction over isolated wetlands. Isolated wetlands are wetlands that are not connected to tributaries of navigable waterways. After a decision of this nature, a technical guidance memorandum is typically issued to help the Districts with interpretations. To date, no such guidance has been issued. As a result, the Districts have been forced to evaluate each situation on a case-by-case basis, which has further expanded their already substantial workload.

Martin Janda and Doug Eldred of BME recently attended the Wetland Forum's annual meeting. In one of the sessions, a representative of the Corps discussed examples of isolated wetland determinations. In general, if there is not a natural stream channel that has a defined bed and bank between the wetland and a navigable waterway or a tributary of a navigable waterway, then the wetland is isolated and not regulated. For purposes of determining if a wetland is connected, a minimum flow condition in the stream channel is not required. However, to determine if the channel itself is regulated, the Corps typically looks for evidence of a mean high water mark in order to take jurisdiction over the stream. Therefore, potentially a wetland could be regulated and the connecting stream channel may not be. Then again, if there is wetland vegetation and hydric soils in the stream, then the hydrology is probably also sufficient to regulate it as a wetland. Got all that?

The following examples were offered as regulated and unregulated wetland situations:

Regulated

- Wetland outlet has a tributary connection to a navigable waterway.
- Wetland has a natural stream channel connection to a navigable waterway or to a tributary of a navigable waterway. The stream channel must have a defined bed and banks.
- Wetland is contiguous with a navigable waterway or one of its tributaries.
- Wetland had a historic natural stream channel or tributary connection that was severed by human activities.
- Wetland had a historic natural stream channel or tributary connection that has been replaced by man-made ditches, channels and/or pipes.

Unregulated–Isolated wetlands

- Kettles or bogs with no outflow.
- Wetlands that have an outflow through a broad undefined overflow area.
- Wetlands that never had a natural connection but have or have had a man-made connection.
- Wetlands that are connected only by groundwater flows.

The above examples are provided with caution. The Corps representative felt that the determinations made by the various Districts would be fairly consistent. However, by lacking specific technical guidance, some disparity between Districts and even between individuals within the same District is possible.

For wetlands that appear to be isolated we typically assemble a package of information showing the drainage conditions into and out of the wetland and the historical inflow and outflow conditions. We then ask the Corps to issue an official Jurisdictional Determination (JD). The Jurisdictional Determination states whether or not the wetland in question is regulated and why. The JD is valid for a period of 5 years.

Why is all of this important? Two reasons. First, if the wetland is determined to be isolated, then the Federal regulations that restrict filling do not apply. Secondly, if you believe a wetland is, in fact, isolated then you may want to get a jurisdictional determination done now even if you do not plan to develop until a later date. The US Corps of Engineers Representative indicated that the determination would be valid for the 5-year period, even if the regulations changed in the interim. About the only thing that seems to be certain with the federal regulations is change. The determination may be a preemptive hedge against potential future regulations.

Obviously the value of the wetland and the cost to develop in it should be considered regardless of whether it is regulated. Also it's possible that a wetland could be regulated by DEC and/or by local code even if the Corps does not regulate it.