

Understanding Wetlands And The 404 Process

by Clyde B. Johnson, SR/WA

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"Our sense of pride in the technology that enables us to make the desert bloom and bring forth year-round crops, to run roads over mountain tops, to alter a watercourse, or to build vast international airports on swampland has been shaken. This is not to say that we have not benefited from our technology, but we now know that we must balance our economic, social, and environmental goals."¹

One of the greatest fears for both private developers and public agencies is the discovery of wetlands on their project. The identification of wetlands and the requirements for obtaining a 404 permit for those interested in depositing dredged or fill material into "waters of the United States, including wetlands" is an issue that has been the center of constant debate since the passage of the Clean Water Act of 1972.

The U.S. Army Corps of Engineers (COE) and the Environmental Protection Agency (EPA) are two of the federal agencies assigned primary oversight responsibility for the nation's wetlands. Other federal agencies may have additional input through comments and recommendations which can create additional responses prior to approval or denial of a permit. The requirements for obtaining the necessary permits can be time consuming, thus creating delays in project scheduling if not properly approached. A methodical analysis of a project should include the following four steps if the potential for wetland impact exists:

1) avoidance, 2) minimization, 3) function and value determination, and 4) mitigation. The level of documentation for each step depends on the type of permit required.

In order to formulate a better understanding of wetlands, it is imperative to grasp the concepts of an *ecosystem*. This is a system composed of plants and animals that exist in an environment of physical and chemical factors so mutually inclusive that with the absence of one factor, the entire system cannot exist. Ecosystem quality and diversity has become a prime factor that dictates wetland replacement requirements and may trigger a greater than one-to-one (acre) replacement strategy.

The reduction in our nation's wetlands has been estimated at 221 million acres for the 48 contiguous states. One interagency report indicated that "one third of the original wetlands has been converted to marinas, vacation homes and lots, airports, industrial plants, parking lots, highways, and other uses. Alternate locations may often have existed, but there was no state or federal requirement that they be considered."² The greatest "other use" has been conversion to farmland.

From 1950 to 1970, it was estimated that the average net annual loss of wetlands was 458,000 acres, with the greatest losses occurring in the states of Florida, Georgia, South Carolina, Maryland, New Jersey, North Carolina and Delaware.

The diverse benefits of wetlands

are now recognized, and what many people once considered wasteland has proven to be a valuable natural resource. "The many benefits of wetlands include production of commercial fish and shellfish, waterfowl, and hardwoods; habitat for diverse wild plants and animals; filtration of pollutants from surface waters; and dissipation of flood waters."³

In their article "The Implications of Federal Wetland Protection Programs for the Real Estate Appraisal Industry," Jaime Alvaay and John S. Baen noted that conversion of wetland to farmland was responsible for 87 percent of the loss in wetlands, urban development at 8 percent, with all other uses at 5 percent. Also, in their discussion of the valuation of wetlands, they found "Conversion of natural wetlands to development uses is an example of market failure. This market failure occurs because the developer does not include as a cost the value of the non-exclusive services produced by the natural wetland. Social cost exceeding private cost prompted the adoption of federal and state policies requiring the granting of a permit before wetland alteration can take place."⁴

With the above information in mind, this article will examine the history, definition(s), procedures for the 404 permit, mitigation requirements, recent legal issues and proposed legislation, and explore how to expedite the 404 process as it relates to wetlands.

THE 404 PERMIT, A HISTORY

Congress, believing that the private sector would neither consider the benefits of wetlands or actively seek other sites for development if wetlands were noted, took action to address wetlands. Recognizing the benefits derived from these highly complex ecosystems and their public trust responsibilities, Congress re-