

**COMMON LEGAL QUESTIONS:
WETLAND
REGULATIONS**



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PREFACE

The following question and answer guide addresses frequently asked legal questions with wetland regulations. It is designed for local, state, and federal government officials, the staffs of land trusts and other environmental organizations, consultants, lawyers and others working with wetland regulations. The summary represents the general law of the land and not necessarily that of a specific jurisdiction. We suggest that you contact a local lawyer if you want more definitive advice concerning the law of a particular state.

The guide is based upon a series of legal studies which contain case citations including Kusler, J. 2004. Wetland Assessment in the Courts, Association of State Wetland Managers, Inc., Berne, N.Y. Available at:
http://aswm.org/pdf_lib/CQ_wetland_assessment_6_26_06.pdf

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Map on page 4 by New York Department of Environmental Conservation

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COMMON LEGAL QUESTIONS

WETLAND REGULATIONS

Have courts upheld the overall constitutionality of federal, state, and local wetland regulations?

A. Courts at all levels including the U.S. Supreme Court have broadly and repeatedly upheld the general validity of wetland regulations.

Does general validity mean that regulations are valid for all properties?

A. No. A landowner may attack the constitutionality of regulations as applied to his or her property even where regulations are valid in general. Regulatory agencies need to be able to support the validity of the regulations both in general and as applied to individual properties. However, the overall presumption of validity for regulations and a presumption of correctness for regulatory agency information gathering and regulatory decisions helps the regulatory agency meet its burden of proof. A court decision of site-specific constitutionality or unconstitutionality will not determine site-specific constitutionality or unconstitutionality as applied to other properties.

Has judicial support for wetland regulations weakened in recent years?

A. No, courts continue to broadly uphold wetland regulations against takings and other challenges. But landowners are more often challenging regulations as a taking and courts are examining wetland regulations with greater care than a decade ago. And, the U.S. Supreme Court and several lower federal courts have reduced the scope of the Section 404 program and have held regulations to be a taking in a few cases.

Does the federal Section 404 program apply to all waters and wetlands?

A. No. Section 404 of the Clean Water Act partially exempts a number of activities. In addition, the U.S. Supreme Court in the SWANCC decision invalidated the migratory bird rule as the sole basis for regulating isolated waters. However, this opinion was ambiguous with regard to what is and is not regulated by the Section 404 program beyond traditionally navigable waters and adjacent wetlands and formal rules interpreting the decision have not been issued by the U.S. Army Corps of Engineers (Corps) or the U.S. Environmental Protection Agency (EPA). Lower federal courts have also limited the scope of Section 404 regulation as applied to drainage where there is not fall-back of dredged materials.

Can local governments regulate wetlands without express statutory authority to do so?

A. Yes. Courts have often upheld local wetland zoning regulations adopted as part of broader zoning. Courts have also, in some cases, upheld local wetland ordinances adopted pursuant to “home rule” powers.



Wisconsin adapted legislation to close the gap created by SWANCC

Can a local government adopt wetland regulations which exceed state or federal (Section 404) minimum standards (e.g., regulate smaller wetlands, regulate fills and drainage, impose more stringent conditions)?

A. Yes. Local government's regulations may exceed state and federal regulations except in New Jersey (and to a lesser extent Virginia) where the state rather than local governments directly regulates wetlands. There is no preemption issue. Similarly, state regulations may exceed federal and local. Federal regulations may exceed state and local.

Can states and local governments regulate some wetlands and not others?

A. Yes, if the governmental unit has rationale basis for distinguishing between wetlands. Many enabling statutes make distinctions between wetlands based upon location (e.g., coastal versus freshwater), size, or National Wetland Classification system class. Courts have sustained these statutory classifications such as regulation of coastal wetlands but not inland.

Are federal, state, or local wetland regulatory agency factual determinations (e.g., assessment of functions, values, impacts, etc.) presumed to be correct?

A. Yes. The burden is on a landowner to prove their incorrectness. In general, courts overturn agency fact-finding only if it finds that such fact-finding lacks "substantial evidence." Courts are particularly likely to uphold factual determinations of federal and state "expert" agencies. They have also given broad support to local government multiobjective regulatory efforts based upon comprehensive land and water inventories and plans. However, courts look more closely at the adequacy of the information gathering where regulations have severe economic impact on specific properties.

How closely must regulatory standards (including conditions) be tailored to regulatory goals?

A. Courts have broadly upheld wetland and other resource protection regulations against challenges that they lack reasonable nexus to regulatory goals. But, as indicated above, courts have required a stronger showing of nexus where regulations have severe economic impact on property owners. They also, increasingly, require a showing that conditions attached to regulatory permits are "roughly proportional" to the impacts posed by the proposed activity, particularly where dedication requirements are involved. This means that the detail and accuracy of information gathering should increase as the severity of impacts increase and there should be a proportional relationship between conditions attached to regulatory permits and achievement of "not net loss" or other regulatory goals.



Have the courts endorsed one wetland assessment approach versus another?

A. No. Courts have in only three reported cases addressed the sufficiency of wetland “assessment” techniques per se. They held that the techniques used by the regulatory agency were sufficient in two of the three. In the third, they did not invalidate the assessment approach per se but held that it did not provide adequate information pertaining to impact of the proposed project on migratory birds. However, courts do require regulatory agencies to follow procedures set forth in their enabling statute or regulations (e.g., mapping, notice and hearing, impact analysis, etc.). And, the outcome of legal challenges to wetland regulations depends, to a considerable extent, upon the overall sufficiency of the data gathering and analytical processes employed by the regulatory agency and the strength of the factual base.

Must a regulatory agency accept one scientific opinion over another?

A. No, courts have afforded regulatory agencies considerable discretion in deciding which scientific opinion to accept in fact-finding as long as the final decision is supported by “substantial” evidence. Also, courts have held that regulatory agencies do not need to eliminate all uncertainties in fact-finding.

Does an agency need to quantitatively “prove” that each wetland is characterized by certain functions and values?

A. No. Courts have broadly upheld wetland regulations based upon a broad range of factors relevant to the “suitability” of “wetland sites” for particular purposes without determination of the specific functions and values of individual wetlands. No court has invalidated regulations for failing to distinguish the relative ecological values of individual wetlands. However, regulatory agencies have been required to demonstrate the rationality of individual permit decisions and this has required in some instances the documentation of functions, values, and hazards and other factors relevant to permitting criteria on a permit-by-permit basis.

Is a quantitative assessment approach more legally defensible than a qualitative approach?

A. Not necessarily. Quantification of wetland functions such as flood storage or conveyance may, in some instances, provide a more accurate and defensible basis for evaluation of impacts and for impact reduction and compensation. But, quantitative approaches may also be more vulnerable to legal attack than qualitative “professional judgment” approaches if they are conceptually flawed or if the regulatory agency cannot competently undertake the quantitative assessment set forth in the regulations due limitations on data, lack of modeling capability, or other reasons. For example, a regulatory agency may be vulnerable when asked to defend a specific calculation for a function or value if the calculation is based upon limited data or incorporates a broad range of simplifying assumptions which may not be valid in specific contexts. Also, agencies should be careful in formally adopting any assessment method which requires quantitative evaluation because agencies are held to their own standards by courts, including standards which may be impractical or difficult to achieve.

What sorts of information may agencies use in regulatory assessment?

A. Agencies can use many types of information in permit evaluation including personnel observations, air photos, wetland maps, reports and information prepared by other agencies, opinion evidence of experts, and even non-expert sources of information provided by adjacent landowners and citizens. The strict legal rules of evidence do not apply to most public hearings and information gathering processes.

May an agency be subject to successful judicial attack for failure to consider important factors in assessment?

A. Yes, in some circumstances. For example, courts have quite often held that agency environmental impact reviews and statements (required at the federal level for some Section 404 permits and at the state level for wetland permits in many states) are inadequate for failing to consider the full range of factors relevant to impact upon the environment. Courts have also invalidated regulatory decisions for failing to consider impacts of proposed activities on pollution, habitat, or other factors listed in regulatory criteria.

Do assessments need to be updated if conditions change?

A. Yes, in some instances courts have held that maps and other assessments such as environmental impact statements need to be updated if conditions substantially change and new information becomes available.

Does an agency need to follow the mapping, assessment, impact assessment, or other requirements set forth in its enabling statute or regulations?

A. Yes. Agencies must comply with statutory, administrative regulation and ordinance procedural requirements. They must also apply the permitting criteria contained in statutes and regulations. However, few statutes contain highly specific assessment requirements. Agencies generally have broad discretion in selection of assessment approaches.

May a regulatory agency regulate wetlands other than those specified in an enabling statute?

A. In general, no, agencies can only regulate the types of wetlands and the areas specified in the enabling statute.



Wetland mapping is required by many state statutes

Must government agencies map wetlands for regulatory purposes?

A. No, not unless a statute or regulation says they must be mapped. Then, yes. Mapping is not required in the federal Section 404 program. But regulatory mapping is required in most state and local wetland regulatory programs.

Are wetland maps invalid if they contain some inaccuracies?

A. No. Courts have upheld maps with some inaccuracies, particularly if there are regulatory procedures available for refining wetland map information on a case-by-case basis.

Can landowners be required to carry out wetland delineations? Provide various types of wetland assessment data?

A. Yes. Courts have held that regulatory agencies can shift a considerable portion of the assessment burden to landowners and that the amount of information required from a landowner may vary depending upon the issues and severity of impact posed by a specific permit. And, agencies can charge permittees reasonable fees for permitting. But, the burdens must be reasonable and the costs of such data gathering may be considered by courts relevant to the overall reasonableness of regulations and whether a “taking” has occurred.

Have courts endorsed one wetland definition over another?

A. Courts have not favored one wetland definition over another. Courts have held that definition of wetlands is up to legislative bodies and administrative agencies.

May a regulatory agency be liable for issuing a regulatory permit for an activity which damages other private property?

A. In some instances, yes, if the permitted activity results in flood, erosion, or other physical damage to other private property owners. This is usually not a major concern to agencies except in flood and erosion hazard areas.

Are some types of wetland data of greater importance in meeting takings challenges than others?

A. Yes. Land ownership, type of water (navigable or not), natural hazards, threats to public safety, and nuisance impacts information are particularly important in meeting takings challenges.

Can an agency rely upon best professional judgment in fact-finding?

A. Yes. This is the way most assessment decisions are made and courts have given agencies leeway in use of professional judgment.

Is economic impact on landowners validly considered in wetland regulatory permitting?

A. Yes. As indicated above, courts often examine the factual basis for regulations more carefully where the regulations have severe economic impact on private property owners. Also, under regulations (e.g., Section 404) requiring a “public interest review” a balancing must occur in permitting between the public need for the regulation and the impact on private property owners. Economic impacts are validly considered. Under other regulations, consideration of economic impact may not be relevant during initial phases of permitting but is relevant if a permit is denied and a permit applicant applies for a variance. Variances are typically issued at the local level only if a landowner can show that, absent the variance, no economic uses are possible for land.

Are highly restrictive wetland regulations including buffers and large lot sizes valid?

A. Courts have upheld highly restrictive wetland regulations in many contexts, particularly where a proposed activity may have nuisance impacts on other properties. However, courts have also held wetland regulations to be a “taking” without payment of compensation in a few cases where the regulations denied all economic use of entire parcels of land.

Do all wetlands need to be regulated at once? Do the same levels of regulation need to be applied to all wetlands?



A. No to both provided there are rational reasons for distinctions.

Do local governments need to adopt comprehensive land use plans prior to adoption of wetland regulations?

A. Statutes authorizing local adoption of special wetland ordinances and bylaws do not require prior comprehensive planning. However, many local zoning enabling acts require that zoning regulations be in accordance with a comprehensive plan. Traditionally courts have not strictly enforced this requirement and have often

found a “comprehensive plan” within the zoning regulations. However, courts are increasingly requiring independent and prior comprehensive planning for local zoning, particularly where state legislators have explicitly required such independent planning.

Courts have also endorsed comprehensive planning and regulatory approaches as improving the rationality of regulations although they have also upheld regulations not preceded by such planning in many instances.

Under what circumstances is a court most likely to hold that wetland regulations “take” private property?

A. Courts are likely to find a “taking” where regulations deny all “reasonable” economic uses of entire properties and where proposed activities will not have offsite “nuisance” impacts. Landowners are also more likely to succeed in takings challenges where the property owner purchased the land prior to adoption of the regulations.

How can a local government help avoid successful “taking” challenges?

A. Local governments can help avoid successful taking challenges in a variety of ways:

1. Adopt a no net loss of wetland acreage and function standard which allows conditional issuance of a permit and compensatory mitigation if permit denial will deny all economic use of an entire property.
2. Adopt large lot zoning for wetland areas which permits some economic use (e.g. residential use) on the upland portion of each lot.

3. Include special exception and variance provisions in regulations which allow the regulatory agency to conditionally issue a permit where denial will deny a landowner all economic use of his or her entire parcel and the proposed activity will not have nuisance impacts.

4. Gather information documenting navigable servitude and public trust, public land ownership, and flood, erosion and other hazards for parcels where regulations may deny all economic use of land.

5. Allow for the transfer of development rights from wetland to non wetland parcels.

6. Reduce property taxes and sewer and water levees on regulated wetlands.



Facts win wetland cases

See also companion question and answer guides: Wetland Assessment in the Courts and Wetland Regulations: Avoiding Legal Problems; Winning Legal Challenges.

SUGGESTED READINGS

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- www.aswm.org
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- <http://www2.eli.org/index.cfm>
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U.S. Environmental Protection Agency. Wetlands. Much descriptive information and many links.

<http://www.epa.gov/owow/wetlands/laws/>
U.S. Environmental Protection Agency. Wetlands. Laws. Summary of federal laws pertaining to wetlands (contains many links to the actual texts of laws).

<http://www.law.cornell.edu/opinions.html>
Legal Information Institute. State Courts – by Jurisdiction. Links to individual states and courts and full text of decisions.

<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/sadmin3.htm>
U.S. Army Corps of Engineers. Statutory Administrative & Judicial Materials. Wetland regulations. Many links to full text of regulations.

<http://www.law.georgetown.edu/gelpi/news/>
Georgetown Environmental Law & Policy Institute. Many links to interesting materials, briefs.



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