WETLANDS AND DEVELOPMENT

by Arthur H. Siegal

One of the most common problems encountered by real estate developers is the discovery of wetlands on property proposed for development. Wetlands provide environmental benefits such as: flood and storm control; wildlife habitat; pollution treatment; erosion control; water protection and filtration; provision of nutrients in water food cycles. Although, in the abstract, most would agree that these are valuable functions that should be protected, a number of issues continue to be debated regarding what is a wetland; what must someone do to develop a wetland; and what remedies are available to someone who is not permitted to develop a wetland.

Governing Statutes

There are two statutes that govern the filling and development of wetlands. Section 404 of the Federal Water Pollution Control Act[1] requires the Army Corps of Engineers and the Environmental Protection Agency (EPA) to permit the discharge of fill materials into navigable waters of the United States, which has been defined to include certain wetlands. The CWA also allows states to administer their own individual permitting programs for the discharge of fill materials.[2] Michigan received this authority in 1983. Only one other state has requested and received this authority.[3]

Michigan's authority to control, regulate and issue permits relating to wetlands is found in the Goemaere-Anderson Wetland Protection Act (Wetland Act).[4] This authority is still subject to oversight by EPA and the corps.[5] EPA has exercised this authority in certain cases.[6]

What's a Wetland?

There have been numerous discussions recently at both the state and federal levels regarding what is a wetland. The Wetland Act defines a wetland as "land characterized by the presence of water at a frequency and duration sufficient to support and that under normal circumstances does support wetland vegetation or aquatic life and is commonly known as a bog, swamp or marsh and which is . . ." contiguous to a lake, pond, river or stream;[7] not contiguous to a lake, pond, river or stream and more than five acres in size;[8] or not contiguous to a lake, pond, river or stream and less than five acres in size if the MDNR determines that the area is essential to the state's natural resources.[9] What is "contiguous?" One recent administrative decision addressed this question.[10] MDNR denied an application for a permit to dredge and fill approximately 15,000 cubic yards of commercial property in Traverse City. The applicant, Smith, requested a contested case hearing, claiming that MDNR had no jurisdiction to regulate the site as a wetland. MDNR claimed it had jurisdiction over Smith's parcel because it was contiguous to a creek based on a surface water connection through a roadside ditch, culverts and intermittent streams. The Administrative Law Judge (ALJ) concluded that, because the word "contiguous" is not defined in the Wetland Act, under the plain meaning of the word, a contiguous wetland must touch or directly contact a lake, pond, river or stream. Therefore, the ALJ proposed to dismiss the case, stating that MDNR lacked jurisdiction to regulate the subject site under the Wetland Act because it did not directly contact the creek. The NRC accepted the ALJ's proposal for decision.[11]

Artificial Wetlands?

In many instances, earthwork or other factors create what appears to be a wetland where one did not previously exist. The Michigan Court of Appeals ruled that where earthwork related to the state's construction of a highway created wetland-type conditions, the conditions are regulated wetlands.[12] A recent administrative case also dealt with this issue.[13]

The NRC rejected an argument that a proposed fill area was not a wetland because the area was wet due to a discharge from a neighbor's septic tank. The NRC found that the area was a wetland because the area had hydric soils and supported wetland vegetation, stating that the Wetland Act does not differentiate between natural and artificial wetlands.

The standards under the federal law appear somewhat different. See *Village of Oconomowoc Lake v Dayton Hudson Corp.*,[14] applying the CWA and holding that a six acre artificial retention pond that was built as part of a warehouse construction project was not part of the "waters of the United States" governed by the CWA, even if the pond drained into groundwater. The court held that this issue was left to be determined by state law.

Permit Process

After a property is determined to be a regulated wetland, unless there is an applicable exemption,[15] before the property may be used, a permit must be obtained.[16] After MDNR receives the permit application (or holds a

hearing on the application), it has 90 days to make a decision. If no action is taken within 90 days, the permit is deemed approved.[17]

The MDNR will review the permit application to determine if the proposed activity: (1) is in the public interest; (2) is necessary and lawful; (3) will not result in an unacceptable disruption of aquatic resources; and (4) depends on being located in a wetland, or no feasible and prudent alternative exists. The MDNR will also consider: the probable impact of the proposal in relation to cumulative effects of existing and anticipated projects; the amount of remaining wetland in the area;[18] and economic value, both public and private, of the proposal.[19] These standards are very demanding and the burden is squarely on the applicant. Often MDNR will recommend issuance of a permit, but for less filling than was applied for.

If a permit is denied, an applicant may contest the decision through the administrative process, including seeking a hearing before an ALJ and followed by consideration before the Natural Resources Commission (NRC).[20] This process can take as long as two years.[21] If the applicant or MDNR disagree with the ALJ's recommendation, either may appeal by filing an exception which leads to an argument before the NRC.

Wetland Mitigation

One suggestion often made is to "mitigate" the destruction of wetlands by creating new wetlands. The Wetland Act permits this approach[22] and the rules MDNR has adopted provide standards.[23] However, mitigation is not a panacea. One cannot simply expect to "swap" replacement wetlands for existing wetlands. The Wetland Act rules provide that "[m]itigation shall not be considered when it is feasible and prudent to avoid impacts. . ."[24] When mitigation is appropriate, it should be provided as close as possible to the proposed development, shall assure no net loss in wetland resources and may require monitoring may be required to document that the replacement wetland has taken hold.[25]

Local Regulation

In 1992, the Michigan Legislature amended the Wetland Act to address municipal regulation of wetlands. The amendments authorize municipalities to adopt ordinances regulating wetlands, provided that the ordinance does not define "wetland" different from the Wetland Act (except that the ordinance may regulate wetlands smaller than five acres in size) and that the ordinance may not require a permit for uses authorized under the Wetland Act.[26] Such local ordinances may not be enacted until the municipality establishes a map inventorying all of the wetlands within its boundaries.[27]

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If the ordinance regulates wetlands smaller than two acres in size, the municipality must approve a use permit unless it finds, in writing, that the wetland is essential to the preservation of the natural resources of the municipality. The Act specifies facts that support this conclusion.[28]

Fines and Penalties

Filling a wetland without a permit when one is required may lead to injunctive relief and civil and criminal penalties. The Wetland Act provides for civil fines of up to $10,000 per day. If a person willfully violates a permit, he or she is guilty of a misdemeanor, and may be punished by criminal fines of up to $25,000 per day of violation or imprisonment for up to one year, or both. Second time violators may be punished by criminal fines of up to $50,000 per day of violation or imprisonment for up to two years, or both.[29]

Wetland Regulation as a Taking

The Wetland Act does recognize that the determination that a piece of property is a regulated wetland may effect a taking of property without just compensation in contravention of the Michigan constitution and authorizes a person denied a wetland development permit to bring suit.[30] If such a plaintiff is successful, the Wetland Act authorizes the court to effect one or more of three remedies: (1) compensation for the full value lost; (2) compel the acquisition of the property at its value before regulation; and/or (3) modify the treatment of the property to minimize the detrimental affect on its value.[31]

Although the Wetland Act provides these remedies, it is rare that a property owner is successful in using them. In *Harkins v Department of Natural Resources*,[32] the court of appeals rejected the plaintiff's argument that the denial of his request for a permit amounted to an unconstitutional taking of his property because the value of his property would double if he were allowed to fill the entire wetland as originally requested. The court stated that an owner deprived of the most profitable use of his property is not necessarily entitled to compensation.

However, in *K & K Constr., Inc. v Department of Natural Resources*,[33] the Michigan Court of Claims found MDNR's denial of a wetland permit effected a taking and ruled that the Wetland Act's provisions regarding takings[34] that limit the value of property taken under the Wetland Act are unconstitutional because "it is solely the province of the court to determine just compensation."[35] The court awarded plaintiffs $5,941,181, the fair market value of the entire 52.67-acre parcel. Because MDNR conceded the plaintiffs' right to develop and/or sell the property and agreed to issue a permit consistent with the plan, the court reduced the award amount by the acreage covered by the plan, leaving an award of $3,245,256 plus interest and ordered the wetland property deemed to have been taken to be conveyed to the state. The court also determined that MDNR's rejection of the plan resulted in the plain-

tiffs' loss of use of the property for several years and constituted an interim taking.

The court's order is currently on appeal to the Michigan Court of Appeals.

A federal case interpreting the CWA also provides some guidance. In *Loveladies Harbor v United States*,[36] Loveladies Harbor, a real estate developer, purchased 250 acres of largely wetland property in New Jersey in the 1950's. Loveladies developed most of the property, leaving 51 acres undeveloped. Of those 51 acres, 50 were wetland. Following adoption of the CWA's provisions regulating wetland development, Loveladies submitted to the state and the corps, numerous (and progressively less ambitious) development proposals. Ultimately, the state approved a plan under which Loveladies would develop 12.5 acres (including the one dry acre) and the remaining 38.5 acres subject to an easement preventing their development in perpetuity. When Loveladies sought approval from the corps, the state objected to the permit, which was denied. Loveladies then brought suit.

On appeal, the Court of Appeals followed the recent trend in takings law,[37] holding that a taking that requires compensation would be found if: (1) there was a denial of economically viable use of the property; (2) the property owner had distinct investment-backed expectations; and (3) the property interest taken was vested by state property law in the owner and was not subject to regulation under state nuisance law.

The parties acknowledged that Loveladies bought the land with distinct investment-backed expectations with which the permit denial interfered and so the court focused on the other two issues.

As to whether there was a denial of economically viable use of the property, the debate centered on the "property" to be evaluated - was it Loveladies' original 250 acres, the 12.5 acres which were the subject of the permit application or something in between. The court held that the acreage to be evaluated depended on the facts of each case. Because New Jersey had thoroughly reviewed and permitted the development of the first 199 acres without imposing any limitations relating to wetlands, the court held that the 51 acres was the appropriate "property" to be evaluated. Because Loveladies had dedicated 38.5 acres to the state, the court held that the denial of the permit for the remaining 12.5 acres effectively denied Loveladies economically viable use of its property.

As to the state nuisance law issue, the court held that it would be inequitable to allow the state to grant its approval and then to defeat the permit by arguing that the filling constituted a nuisance to defeat the permit. Also, the nuisance issue had been addressed by the trial court which concluded that the filling did not constitute a nuisance. Therefore, the $2.6 million plus judgment below was affirmed.

Conclusion

The recent trend has been to allow more development of wetland property and this trend appears likely to continue. However, the process by which wetlands are developed is a lengthy and complicated one and is not to be taken lightly by either the developer or his/her attorney.

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Footnotes

1 33 USC §§1251-1387 (referred to herein as the CWA); 1344
2 33 USC §1344(g)
3 New Jersey
4 1979 PA 203, as amended, MCL §281.701 *et seq.*
5 33 U.S.C. §1344(j)
6 *Friends of the Crystal River v United States Environmental Protection Agency*, 794 F.Supp. 674 (W.D. Mich. 1992), affirmed, 35 F.3d 1073 (6th Cir. 1994). The court ultimately held that EPA's revocation of permitting authority and reauthorization of MDNR violated Section 404((j) of the CWA.
7 MCL §281.702(g)(i)
8 MCL §281.702(g)(ii), except this definition does not govern wetlands which would othenwise qualify, but which are located in a county with a small population, until MDNR certifies that it has inventoried the wetlands in that county.
9 MCL §281 .702(g)(iii). See also rules promulgated by MDNR at MAC R 281.921 *et seq.*
10 *In re Smith*, No. 87-6-208W (NRC Proposal for Decision Feb. 11, 1994, and Final Order May 18, 1994)7
11 Interestingly, the ALJ and the NRC appear to have ignored the rules' definition of contiguity which is broader than the definition applied. MAC R 281.921.
12 *Citizens Disposal v MDNR*, 172 Mich. App. 541; 432 N.W.2d 315 (1988)
13 See *In re Cluff*, No. 90-6-389 (NRC Final Order May 21, 1994)
14 24 F.3d 962 (7th Cir. Wis. 1994) cert. den. 115 S.Ct. 322 (1994)
15 The act describes a number of activities in a wetland which do not require a permit. See MCL §281.706. Also, a permit may not be required if governed by the Inland Lakes and Streams Act or the Great Lakes Submerged Lands Act. *Id.*
16 See MCL §281.705.
17 MCL §281.708(2). See *Wait v Harmes*, No. 94-23046-AA (Sanilac County Court Feb. 6, 1995). See *Harkins v Department of Natural Resources*, 206 Mich. App. 317 (1994), apo. den., 527 NW2d 507(1994), (failure by MDNR to act on a permit application within 90 days was of no effect because the period did not begin until MDNR had received additional information from Harkins to "complete" the application; also, the Wetland Act does not require that the applicant be notified of MDNR's decision during the 90-day period, only that MDNR make a decision). See also *Attorney General v Piller*, 204 Mich. App. 228; 514 N.W.2d 210 (1994), when MDNR failed to timely act on a permit application, the permit issued by operation of law but the applicant may not recoup its attorneys' fees under MEPA.
18 See *In re Flaska*, No. 91-6-281 (NRC Final Order Dec. 13,1993)
19 MCL §299.709. See *Friends of Crystal River v. Kuras Properties*, No. 89-63221 -CE (Ingham Cty. Cir. Ct. Apr. 14, 1994), and *Harkins v DNR, supra.*
20 MCL §281.708(2)
21 A 1994 study of the federal permitting process concluded that the permit review process alone took an average of 373 days to complete.
22 MCL §281.710(2)
23 MAC R 281.925
24 MAC R 281.925(3)
25 MAC R 281.921(5). See *Attorney General v City of Wayne*, No. 92-73008-CE (Ingham Cty. Cir. Ct. May 18, 1993) and *Friends of the Crystal River v Kuras* and 60 Fed Reg 12286 (March 1995)
26 MCL §281.708(4); the amendments also provide procedures to appeal a permit denial by a municipality and allows an applicant who has been denied a permit to require the municipality to value the property subject to the use restriction for property tax purposes. MCL §281.708c.
27 MCL §281 .708a. Except municipalities with small populations are not required to map wetlands on public lands. *Id.* Also, the Attorney General has confirmed that a municipality adopting a wetland ordinance must have only one decision-making body that reviews and approves site plans, plats, and related matters and wetland use determinations concerning the same wetland use application. *Id.*; Op. Attv. Gen. 6801, (Mich. A.G.) (June 2,1994).
28 MCL §281.708b
29 MCL §§281.713, 281.714, 281.715. Note: a Michigan man was federally indicted in 1993 for illegal filling. *U.S. v RaPanos*, 93-CR-20023-BC (E.D. Mich. 1993)
30 MCL §281.721
31 MCL §281.721
32 *supra.*
33 No. 88-12120-CM (Mich. Ct. Cl. Sept. 8,1993)
34 MCL §281.721
35 Slip op. at 1-2
36 28 F.3d 1171 (Fed. Cir. 1994)
37 Evidenced by the cases of *First English Evangelical Lutheran Church of Glendale v County of Los Angeles*, 482 US 304 (1987) and *Lucas v South Carolina Coastal Council*, 112S.Ct 2886(1992)