

## MEMORANDUM

Subject: Wetland Definition

From: Director, Office of Environmental Policy  
Washington, D.C. 20590

To: Regional Federal Highway Administrators  
Regions 1 - 10, and Direct Federal Program Administrator

Date: June 19, 1986

Reply to  
Attn. of: HEV-20

During the recent series of Environmental Overview Courses a question was raised concerning the appropriate definition to be used to identify a wetland.

Section 777.11(b) of 23 CFR states that the Federal Highway Administration will use the definition adopted by the U.S. Army Corps of Engineers (COE) (33 CFR 323.2(c)) in its administration of the Section 404 permit program. It reads:

"(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions (emphasis added)."

The other definition most commonly in use today is that contained in the Fish and Wildlife Service (FWS) publication titled "Classification of Wetlands and Deep Water Habitats of the United States - 1979." It reads:

"For purposes of this classification wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports predominately hydrophytes, (2) the substrate is predominately undrained hydric soil, and (3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year (emphasis added)."

It is generally accepted that the FWS definition is broader than that of the COE as it only requires the presence of one out of three attributes, whereas the COE definition requires the presence of all three (hydric soils, hydrophytic vegetation, and periodic inundation or saturation). The FWS definition has not been incorporated into Federal law or regulation and serves only as the basis for this particular classification system.

For all practical purposes, we have found differences of definitional interpretation between

natural resource agencies and highway agencies are extremely rare and usually occur when site conditions are abnormal, such as during an extremely dry or wet period.

Attached for your further information is an article from the May-June 1986 National Wetlands Newsletter which discusses two court cases involving the definition of wetlands. The court decisions give support to the position that all three attributes of a wetland must be present. The courts went a step further and found that the COE interpreted its own definition too broadly in classifying lands as wetland which in the view of the court were not. This reinforces the position that a certain amount of subjective judgment is necessary to determine whether a specific property is or is not a wetland.

Should any field office feel that natural resource agencies are expressing concern and responsibility for lands which do not meet the COE definition, the Headquarters staff is available for assistance.

/ Original Signed by /

Ali F. Sevin

Attachment

## **Wetlands Or Uplands-Northwest Courts Make the Call**

**David E. Ortman**

Friends of the Earth

Seattle, WA

On November 15, 1985, federal district court Judge Donald Voorhees dismissed an enforcement action brought by the Army Corps of Engineers against a landowner who deposited fill material on his property without a Clean Water Act §404 permit, *United States v. Youngsman*, No. C85-1220V (W.D. Wash. Nov. 15, 1985). The court ruled that the land, which is located in Skagit County, Washington, was not a wetland within the meaning of §404.

While the court heard considerable testimony relative to the tract's soil and hydrology, it agreed with the parties that the critical issue centered upon the character of the vegetation. The Corps had mapped the plant growth on eight acres of the defendant's 11-acre parcel. Typical wetland plants were found in three areas—two areas contained pickleweed and one area contained fat hen. In addition, the Corps concluded that six of the mapped acres constituted §404 wetlands because the prevalent vegetation was creeping bent grass, which is "typically adapted for life on saturated soil conditions."

Judge Voorhees disagreed and ruled that the Corps acted arbitrarily and capriciously in determining that the defendant's land was wetlands. Substituting its own view for that of the Corps biologist, the court found that the pickleweed and fat hen areas were not "extensive enough to cause the defendant's land to be deemed a wetland." Also, the fat hen area was not "bordering, contiguous or neighboring" to navigable waters of the United States and thus was not an adjacent wetland within the meaning of the Corps' §404 regulations.

The court further found that creeping bent grass could not be considered a wetland plant since it was found on adjacent upland and since other obligate wetland plants were not widespread on the tract. Also significant, in Judge Voorhees' view, was the fact that a Corps manual of 49 wetland species, entitled "Wetland Plants of the Pacific Northwest," did not list creeping bent grass as "a wetland plant." That several wetland inventories, including the U.S. Fish and Wildlife Service's National Wetlands inventory, did not identify the tract as wetlands served to reinforce the court's conclusion that the defendant's property was not §404 wetlands. Based on this ruling, future wetland inventories should probably specify that wetlands are dynamic ecosystems which may increase or decrease over time and that other unmapped wetland areas may be found within the study area.

The decision in *United States v. Brassey*, No. 81-1072 (D. Idaho 1982), is another example of a district court overruling a Corps wetlands determination and holding that an area was not a wetland subject to §404 regulation. In this case the defendant owned property in Boise County, Idaho. The property was subject to seasonal fluctuations in surface water and groundwater, becoming wet and muddy in the spring, and early summer, but generally completely dried out in the late summer and early fall. In July 1979, the defendant without a §404 permit began to fill and level the property, as well as construct a ditch to divert water for irrigation purposes. The Corps, upon visiting the site, informed the defendant of the need to

obtain a permit. The defendant nevertheless continued the work, and the Corps issued a cease and desist order.

Judge Taylor dismissed the Corps' enforcement action, ruling that the property did not constitute a wetland within the meaning of §404:

It must be recognized that what is or is not a "wetlands" for purposes of the [Clean Water Act] is categorically not a scientific inquiry, but solely a jurisdictional issue. The testimony in this case and the definition itself makes it apparent that the definition of "wetlands" contained in [the Corps' regulations] is much narrower in scope than is the generally accepted scientific definition of the term. While scientific understanding undoubtedly contributed to the formulation of the definition, the final language was necessarily the result of political, social and constitutional considerations. Because of this fundamental distinction, no amount of expert testimony characterizing a specific area as a "wetlands" site can conclusively establish it as such or overcome the specific parameters of the actual definition contained in the federal regulations. A "wetlands" is, for the purpose of this Court's consideration, precisely and exclusively what Congress says it is, and no more.

The court rejected "reliance upon a single quantitative test or established scientific calculus" when determining whether an area is a §404 wetland. All that was needed, in Judge Taylor's view, was the untrained eye of a public citizen:

What is required in the opinion of this Court is that an area be saturated or inundated by water with sufficient regularity that an ordinary person [emphasis added] would understand that the prevalent vegetation is indicative of a normally aquatic environment. This is apparent from the last sentence in the definition stating that "wetlands generally include swamps, marshes, bogs and similar areas."

Because several witnesses testified that the defendant's property frequently was completely dry during warm summer and fall periods, the court determined that, "an *ordinary visit[o]r* [emphasis added] to the property during these warm months would have considerable difficulty conceiving the area to be a 'wetlands'. . . . The fact 'wetland' indicator plants existed on defendant's property and may have predominated for certain limited times is not alone sufficient to warrant a 'wetlands' determination." Thus, *the* defendant's property was not a §404 wetland and was outside the jurisdictional reach of the Clean Water Act.

The difficulties encountered in both cases resulted from the Corps' own regulations. Such difficulties are based upon the fact that the Corps' wetlands definition appears to be better suited to eastern, rather than western, wetland types. By choosing not to seek an appeal of either district court ruling, the Corps has facilitated the loss of wetlands habitat.