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Louisiana Wetlands News

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Newly Proposed White House Wetlands Policy

In late August 1993, the White House Office on Environmental Policy released the newly proposed wetlands policy recommendations and revisions report. This report represents the Clinton Administration's comprehensive package of improvements to the federal wetlands regulatory program. These recommendations were developed through the work of an Administration Interagency Working Group on Federal Wetlands Policy that met from June through August 1993. The group was chaired by the White House Office on Environmental Policy and had participation from EPA, the U.S. Army Corps of Engineers, the Office of Management and Budget, and the departments of Agriculture, Commerce, Energy, Interior, Justice, and Transportation. After receiving input from a broad range of interests, the working group developed a comprehensive package of wetlands reform initiatives. Specific initiatives in the package include the following:

- Acceptance of an interim goal of no net loss of the nation's remaining wetlands and a long-term goal of increasing the quality and quantity of the nation's wetlands;
- Recommends the Corps establish an administrative appeals process so that landowners can seek recourse short of going to court;
- Recommends that the Corps establish deadlines for wetlands permitting decisions under Section 404 of the Clean Water Act;
- Issues final regulations exempting prior converted cropland from the Corps Section 404 wetlands regulations (this places into regulation an existing agreement between the Corps, SCS, and agricultural producers that had temporarily exempted prior converted cropland from the Section 404 wetland regulatory process);
- Establishes the SCS as the lead agency responsible for identifying wetlands on agricultural lands under both the Clean Water Act and the Food Security Act;
- Clarifies the term "discharges" of dredge and fill material to wetlands and other waters of the U.S. so that regulatory "loopholes" cannot be utilized for certain projects using expensive and sophisticated methods that did not require Section 404 authorization;
- Emphasizes that all wetlands are not of equal value and requires that EPA and the Corps issue guidance to field staff highlighting the flexibility that exists to apply less vigorous permit review to small projects with minor environmental impacts;

- Requires that the U.S. Army Corps of Engineers, EPA, SCS, and the Fish and Wildlife Service use the same procedures to identify wetland areas;
- Endorses the use of mitigation banks to help attain the no overall net loss wetland goal;
- Strongly supports incentives for states and local governments to engage in watershed planning;
- Supports increased funding for the Wetlands Reserve Program;
- Promotes the restoration of damaged wetland areas through voluntary, non-regulatory programs.

The exemption of prior converted croplands (cropland that was converted prior to December 24, 1985, and no longer exhibits wetlands characteristics) from the Section 404 regulatory process simply puts into regulation an existing agreement that had been honored by the Corps and SCS for the past 2-3 years.

One key question still remains unanswered. Even though SCS has been declared the lead agency in identifying wetlands on agricultural lands, a specific definition for "agricultural lands" has not been clearly established. Whether all lands owned by a farmer will be included in the definition of agricultural lands (managed forest lands, wooded tracts adjacent to farms, aquaculture sites, grazed marsh rangelands, prairie pasture land) has not been determined to date.

Additionally, the most critical question of what is a wetland has not yet been answered and has recently been assigned to the National Academy of Sciences for resolution. The Academy's final report will not be completed until late 1994, and a new wetland definition may require entirely new wetland delineation procedures.

As this new wetland policy unfolds, I will continue to keep you informed through this newsletter.

To obtain a copy of the full report, titled "Protecting America's Wetlands: A Fair, Flexible and Effective Approach," contact the Louisiana Cooperative Extension Service Office in your parish.

Proposed Mitigation Regulations for the Louisiana Coastal Zone

Over the past two years the Louisiana Department of Natural Resources (DNR) has been developing mitigation regulations that will provide general procedures for avoiding, minimizing, and restoring adverse impacts identified in the Coastal Use Permit (CUP) review process. Specifically, the proposed regulations will attempt to quantify anticipated unavoidable wetland ecological value losses, determine compensatory mitigation requirements, establish mitigation credit banking areas, and evaluate and process requests for variances from the compensatory mitigation requirement.

Under the proposal, the secretary of DNR is authorized to deny Coastal Use Permits for activities within the Coastal Zone if a proposed use or activity is not consistent with the mitigation guidelines. These guidelines include the following specifications:

1. The project must include locations, designs, methods, practices, and techniques which may be required to avoid, minimize, and restore adverse impacts identified during the permit review process; and
2. A requirement for compensatory mitigation to offset any net loss of ecological value that is anticipated to occur despite the avoidance, minimization, and restoration efforts unless a variance is granted by the secretary.

If the DNR secretary determines that the proposed activity complies with the guidelines and would not result in a net loss of ecological values associated with wetlands, compensatory mitigation will not be required.

Anticipated net gains and unavoidable losses of ecological value associated with the project will be quantified through an evaluation process that takes into account both with and without project wetland losses or gains that are expected to occur in the project area. The final compensatory mitigation determination will adjust for "natural" wetland loss rates in the project area and allow for the earning of positive ecological value credits associated with project. Ecological value is

defined as the ability of an area to support vegetation and fish and wildlife populations.

Future-with-project and future-without-project scenarios shall be determined for the expected life of the project. Project years represent the anticipated number of years that the proposed activity would have a negative or positive impact on the ecological value of the site. Project years for marsh habitats will be set at twenty (20) years and for forested habitats fifty (50) years.

Compensatory mitigation shall be accomplished through one or more of the following options:

1. Acquisition of an appropriate type and quantity of mitigation credits from a mitigation bank approved by the DNR secretary;

2. Implementation of an individual mitigation measure or measures to offset the ecological value losses associated with the permitted activity;

3. Monetary contribution to the Louisiana Wetlands Conservation and Restoration Trust Fund.

Mitigation banks are defined as identified areas with specific measures implemented to create, restore, protect, and/or enhance wetlands, for the purpose of producing ecological values, measured as Average Annual Habitat Units (AAHUs) or credits. Credits may be donated, sold, traded, or otherwise used for the purpose of compensating for the ecological values lost due to a permitted activity.

When compensatory mitigation is required, the following schedule of proposed fees is established to cover the cost of DNR's compensatory mitigation determination process:

Acres of Direct Impact	Compensatory Mitigation Processing Fee
1 - 1.0	$ 300
1.1 - 2.0	600
2.1 - 3.0	900
3.1 - 4.0	1,200
4.1 - 5.0	1,500
5.1 - 10.0	2,250
10.1 - 15.0	3,750
> 15	6,000

This fee schedule will apply regardless of which compensatory mitigation option is selected and in addition to any cost incurred to implement the required compensatory mitigation.

Non-commercial activities which directly affect 1.0 acres or less of vegetated wetlands are, however, exempt from the processing fee.

The goal of the fee schedule is to generate 50% of the compensatory mitigation program administration costs, based on permit data from calendar year 1992.

The order of preference for compensatory mitigation options are as follows:

a. On-site, individual compensatory mitigation proposal submitted by the affected landowner and acceptable to the applicant;

b. On-site, individual compensatory mitigation proposal, negotiated among the landowner, applicant, and the DNR secretary;

c. Acquisition of mitigation credits, if the affected landowner has an approved mitigation bank;

d. Off-site, individual compensatory mitigation proposal submitted by the affected landowner and acceptable to the applicant;

e. Off-site individual compensatory mitigation proposal on the affected landowner's property, negotiated among the landowner, applicant, and the DNR secretary;

f. Acquisition of credits from a mitigation bank not on the affected landowner's property;

g. If the area affected is less than five acres, contribution to the Louisiana Wetlands Conservation and Restoration Fund;

h. If the area affected is greater than five acres the first priority would be

individual mitigation proposals not on the affected landowner's property followed by contributions to the Louisiana Wetlands Conservation and Restoration Fund.

The proposed regulations also allow for the DNR secretary to grant a full or partial variance from the compensatory mitigation requirements (variance) when a permit applicant has satisfactorily demonstrated that 1) the required compensatory mitigation would render a proposed permitted activity impracticable, and 2) the proposed activity has a clearly overriding public interest. Overriding public interest means that the public interest benefits of a given activity clearly outweigh the public interest benefits of compensating for wetland values lost as a result of the activity; examples provided include certain mineral extraction, production, and transportation activities or construction of flood protection facilities critical for protection of existing infrastructure.

Questions and requests for mitigation plan reports should be submitted through the Louisiana Department of Natural Resources in Baton Rouge at (504) 342-1375.

Mitigation Banking

Mitigation banking is a concept being promoted to protect wetlands while still allowing some development to occur. Mitigation banks use a credit and debit system just as commercial lenders operate, but here wetlands are "deposited" and "withdrawn." Property owners and developers can earn credit by creating or restoring wetlands in advance of implementing any wetland development project. Credits would be withdrawn to compensate for wetland losses when the development project is ready for implementation. The proposed DNR Compensatory Mitigation Regulations for the Louisiana Coastal Zone summarized above strongly hinge on the development of mitigation banks.

The Mitigation Credit Market

Many wetland scientists support the development of a private market for the creation and trading of compensatory wetland mitigation credits. This market solution is considered the next step beyond the traditional, single-user mitigation banking arrangements. The challenge of creating regulations conducive to such markets is being actively discussed at all levels of government.

A market-based mitigation policy begins with the assumption that a permit applicant (a subdivision developer) wants a permit and has no long-term interest in wetlands. At the same time, wetland regulatory agencies want to protect and restore the ecological functions of watersheds and have no central interest in the proposed development project. Restoration firms or mitigation consultants see the selling of mitigation credits as a profit-making opportunity and wish to sell their services to permit applicants. These seemingly incompatible objectives produce the environment for potential deal-making or trading, which is the essence of markets.

Mitigation credit trading can reduce the institutional and ecological sources of mitigation failure in the following ways:

1. If permit applicants purchase credits from an operating mitigation firm which has restored or created wetlands, the need to enforce permit requirements is reduced.

2. If wetland credits are created by mitigation firms, they can be planned for and placed in a larger watershed context so that problems of wetland fragmentation and isolation are minimized.

3. If mitigation credits are readily available for sale, the reality of successful mitigation makes the negotiations over permit applications more focused on issues concerning the need for the permit and the future ecological value of the impacted wetland area.

The creation of a market system for trading wetland credits will, however, require the careful development of trading rules to ensure economic viability, to limit and allocate the risks of failure, and to advance the regulatory goals of no-net-loss and net gain in wetland functions.

If carefully structured, the private market alternative has the potential to offer a competitive economic return on investment to private wetland restoration firms. Regulators could benefit by achieving net gains in wetland function through mitigation trading

under a system that insures against the risk of project failure. Permit applicants should also benefit through reduced regulatory processing time and increased predictability. The high cost of simply getting a permit decision could also be reduced.

The DNR compensatory mitigation proposal summarized in the first section of the newsletter represents a more traditional wetland mitigation approach that hinges heavily on the development of mitigation banks. A true credit market system, however, may offer opportunities for the future in Louisiana.

Reference: Wetland Journal, Vol. 5(2), Summer 1993.

The Importance of Louisiana's Barrier Islands

The chain of barrier islands located along the Louisiana's southern perimeter help to protect the fragile coast from the direct forces of gulf hurricanes and tropical storms. The vast coastal infrastructure consisting of thousands of oil and gas platforms, large port facilities, and many coastal dwellings depend heavily on barrier islands for protection. Additionally, barrier islands protect our productive interior marshlands in the event of an accidental offshore oil spill.

State officials estimate that between 30 percent and 40 percent of Louisiana's barrier islands were lost due to erosion caused by Hurricane Andrew. East Timbalier Island, which is less than one-half mile wide, suffered tremendous erosion which caused the island to be broken up into several smaller sections. Other important barrier islands include the Chandeleurs, Grand Isle, Grand Terre, and the Isle of Dernieres. Only Grand Isle has a bridge linking it to the Louisiana mainland.

Louisiana wetlands are responsible for producing 30 percent of the nation's marine fisheries resources, as well as the nation's largest fur and alligator harvests. Additionally, barrier islands provide valuable nesting places for the endangered brown pelican and numerous species of shorebirds. If Louisiana's barrier islands are allowed to continue to deteriorate, serious ecological consequences may result. Continued efforts must be made to ensure barrier island protection and restoration if the valuable benefits listed above are to be maintained.

The Lucas Case and Private Property Rights

In 1986, Lucas purchased two vacant oceanfront lots within an established subdivision that were surrounded on both sides by beautiful homes. At the time he bought the lots, Lucas planned to build homes similar to those already located around his property; such construction and development was not prohibited at that time by the existing South Carolina coastal management program. In 1988, however, the program was changed and construction on Lucas' lots was prohibited. All construction was prohibited within inlet erosion zones, where Lucas' lots were located.

Faced with this prohibition on construction, Lucas filed a claim for compensation alleging that the regulatory restriction was a taking of his property. The trial was held in August 1989, and the court found in Lucas' favor, awarding him $1.2 million. The state appealed the award to the S.C. Supreme Court, where the decision was reversed. The state Supreme Court determined that no taking had occurred and overturned the original decision. Lucas then applied to the United States Supreme Court for a writ of certiorari, which was granted. In June 1992 the United States Supreme Court handed down its opinion in Lucas.

In the Lucas v. South Coastal Commission, the court concluded that when a land-use regulation so restricts a landowner's ability to use land that he/she is denied all economically viable or productive uses, the government must either pay just compensation or lift the restriction. A refusal to pay compensation or lift the limitation would be a violation of the "takings" clause of the Fifth Amendment of the United States Constitution.

During litigation of the Lucas case, the South Carolina coastal management program changed the permit specifications and provided for the possibility of permitting home construction on beachfront lots. Because of that change, Lucas may now be able to obtain a permit to build on his lots. He, therefore, would not be entitled to a damage award for the full value of the lots, but only for whatever losses he experienced during the time he was unable to build because of the unconstitutional restrictions of his rights. The United States Supreme Court sent the case back to the South Carolina courts for a redetermination of Lucas' damages. This "temporary taking" claim is now before the South Carolina trial court.

The court did not say that there is a taking every time development of a site is prohibited by the denial of required permit and an economically beneficial use of the land is lost. The vast body of environmental land-use regulations rarely is so restrictive that a landowner cannot make any economically viable or productive use of his or her property. "Partial" takings of the economically viable uses of private property through regulations were not addressed in the Lucas case, however, and this still remains a major private property rights issue today.

Most Americans believe that a person who acquires undeveloped land is expected to change its natural character and put it to some economically productive use. No one expect to be completely precluded from doing what others have done in the past. At most, landowners expects changing environmental regulations to possibly restrict development but not prohibit it. Zoning regulations, subdivision covenants and other similar restrictions affect what a landowner can do, but they do not totally prohibit broad economic activities. The land can still be used in an economically beneficial manner.

The state's common law of nuisance generally establishes the limitation of what landowners can and cannot do on private property. Nuisances are unreasonable interferences with another's right to use and enjoy land. No one can act blindly and in disregard of how an activity might harm others. The law of nuisance, however, looks to accommodation before it will prohibit a particular activity; it balances the legitimate expectations of all affected by the activity.

In determining the extent of a nuisance, the court will consider:

1. the degree of harm to public lands and resources or adjacent private lands;

2. the social value of the activity and its suitability to the locality in question, and;

3. the relative ease with which the alleged harm can be avoided through measures taken by the claimant, the government, or adjacent property owners.

Even with activities that might potentially be a nuisance, the law looks first to minimizing the conflict rather than completely prohibiting the activity in question. Regulatory prohibition must be preceded by attempts to reduce to an acceptable level the risks that the regulatory program is intended to prevent.

The Lucas decision placed governmental regulators in a position to approach restrictions on development and use of private property with some degree of sensitivity to the conditions associated with the location of the land and the specific project being proposed. Regulators must also be willing to make reasonable accommodations that might allow some economically beneficial use of the property, while minimizing the risk of harm to public and private resources.

Landowner issues related to the 'partial' loss of certain economic benefits associated with the possible creation of a public nuisance have not been addressed in the Lucas case. "Takings" litigation will no doubt continue to take center stage in the continuing private property debate.

Reference: "Legal Tides." Spring/Summer 1993.

New Law Passed Relative to Prescribed Burning for Land Management

During the 1993 Legislative Session a new law was approved establishing voluntary best management practices for forestry, agriculture, and marshland prescribed burning activities. Act 589 directs the commissioner of agriculture and forestry to promulgate voluntary rules and regulations for prescribed burning and provide definitions for BMPs.

Prescribed burning is commonly used in Louisiana to 1) reduce naturally produced vegetative fuels in an effort to reduce the risk and severity of wildfire, and 2) as a habitat enhancement management tool essential to the perpetuation, restoration, and management of plant and animal communities.

As Louisiana's population continues to expand into rural areas, pressures from liability issues and nuisance complaints have continued to inhibit the use of prescribed burning. Act 589 was approved to authorize and promote the continued safe use of prescribed burning for ecological, silvicultural, wildlife management, agricultural, and range management purposes.

The Act authorizes the Louisiana State University Agricultural Center to develop a Prescribed Burn Manager Certification Program and provides for final certification by the Louisiana Department of Agriculture and Forestry. Prescribed burning is defined as a "controlled application of fire to naturally produced on-site vegetative fuels and sugar cane under specified environmental conditions, following appropriate precautionary measures, which causes the fire to be confined to a predetermined area to accomplish planned land management objectives, including the harvest of sugar cane."

Prescribed burning as authorized by the commissioner must:

1. be conducted only under written authority according to the requirements of the commissioner;

2. be conducted only when at least one certified prescribed burn manager is present on site from ignition until the burn is completed and declared safe according to predetermined guidelines; and

3. be considered a property right of the property owner if naturally occurring vegetative fuels are used or when conducted according to the requirements of the law.

When a prescribed burn is conducted according to the regulations set forth by the commissioner, no property owner, lessee, or any person or entity owning a property interest of any kind, or their agent or employee conducting the burn shall be liable for damage, injury, or loss caused by fire, resulting smoke, or other consequence of the prescribed burn, unless negligence is proved.

The Prescribed Burn Manager Certification Program is a voluntary program that will be made available to agricultural, silvicultural, and coastal marsh managers in an effort to improve burn practices and reduce exposure to liability. For more information about Act 589, contact the Cooperative Extension Service office in your parish.

Wetland/Watershed Bills Introduced in Congress

The 103rd Congress seems poised to begin debate on the reauthorization of the Clean Water Act (CWA). Several bills addressing wetland protection and watershed planning have been introduced and should soon be ready for hearings:

Wetland Protection

S. 1304 - (Senators Baucus and Chafee)

- Establishes in law the "no net loss" wetland policy
- Makes wetland protection a stated objective of the Clean Water Act
- Expands Section 404 regulatory coverage to include wetland draining and excavation, as well as filling
- Requires EPA and the Corps of Engineers to develop a national wetland restoration strategy using wetland/watershed plans produced by states and other federal agencies to protect existing wetlands
- Sets deadlines for the approval or denial of permit applications
- Allows for "rational" public appeals of permit decisions
- Arranges for quick permitting for the implementation of an approved wetland management plan
- Requires increased wetland-related public education and research
- Authorizes the creation of mitigation banks
- Exempts prior converted croplands from the Section 404 permitting process
- Exempts most farming and silvicultural practices from the Section 404 permitting process
- Authorizes states to assume administration of the Section 404 regulatory program
- Provides funds for the development of state and local watershed plans

- Mandates continued use of the 1987 Corps of Engineers Wetlands Delineation Manual

- Allows for the development of a new "manual" with sufficient public input, consultation with states, the availability of the best available scientific information, and consideration of regional variations of soils, hydrology, and vegetation. No new manual could be issued until the National Academy of Sciences produces its pending wetland definition report which is due in the fall of 1994.

- Requires federal agencies to develop consistent policies for wetland determinations affecting agricultural land under the Farm Bill and the CWA. Wetland determinations made by SCS under the Farm Bill would be accepted by EPA under the CWA.

S. 1195 (Senator Boxer)/Companion Bill - H.R. 350 (Rep. Edwards)

- Similar in intent and content to S. 1304

- Does not contain mitigation banking provisions

- Provides tax incentives for landowners to preserve wetlands

- Establishes a national policy to preserve the quantity and quality of wetlands, and to restore degraded wetlands

- Strengthens the advisory roles of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service

H.R. 1330 - (Rep. Hayes)

- Requires all three wetland parameters (hydrology, vegetation, and soil conditions) to be present at the time of delineation to be classified as a wetland

- Requires land inundation/saturation for 21 consecutive days during the growing season to meet the wetland hydrology criteria

- Delineated wetlands would be categorized into three levels of value with restrictions placed on the highest value wetlands considered a "taking" by the government that would require just compensation

- No more than 20% of a parish or county could be designated as high value wetlands

- Authorizes state assumption of the Section 404 wetland regulatory program

- Removes EPA's authority on wetlands policy, leaving jurisdiction with the U.S. Army Corps of Engineers

- Authorizes the development of a mitigation banking program

Watershed Planning - Watershed planning looks at an entire watershed and examines how activities throughout the watershed (construction, forestry, agriculture and other activities) contribute to nonpoint source pollution.

S. 1114 - (Senators Baucus and Chafee)

- Provides provisions for watershed planning and control of nonpoint sources of pollution

- Encourages the development and implementation of best management practices (BMPs) aimed at reducing nonpoint source pollution runoff into surface and subsurface waters

H.R. 2543 - (Rep. Oberstar)

- Provides for watershed planning and control of nonpoint sources of pollution

- Sets a goal of full restoration and protection for watersheds

- Requires states to target watersheds threatened and degraded by polluted runoff, and restore watersheds to full compliance with water quality standards

- Provides landowners with site-specific assistance from state and federal agencies for the implementation of best management practices (BMPs) designed to reduce nonpoint source pollution

As CWA reauthorization debate continues, I will continue to keep you informed through this newsletter.

Environmental Conference Set For November 16-17, 1993

In an attempt to keep constituents abreast of current environmental issues, an "Emerging Environmental Challenges '93" conference will be held at the Baton Rouge Hilton Hotel on November 16-17, 1993. The conference is being co-sponsored by the LSU Agricultural Center, the Louisiana Department of Agriculture and Forestry, the Louisiana Department of Environmental Quality, the Louisiana Department of Natural Resources, the U.S. Soil Conservation Service, and the U.S. Agricultural Stabilization and Conservation Service.

Topics will include pollution prevention, best management practices, wetland policy developments, permitting requirements, Coastal Zone Act Reauthorization Amendments of 1990, and stormwater plan development.

Pre-registration for the conference is $60 with reduced daily registration available.

For more information, or to obtain a registration form, contact your parish Cooperative Extension Service office.

If you have any questions, or if you want additional wetland or coastal resource-related information, please do not hesitate to call.

Sincerely,

Paul Coreil, Area Agent
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The Louisiana Cooperative Extension Service provides equal opportunities in programs and employment.