



The Issue:

The environmental importance of the nation's true wetlands is widely known. However, the federal wetlands protection program in effect today under Section 404 of the Clean Water Act is not the product of a carefully considered and fully debated environmental policy. Over the years, it has evolved into a confusing layer of regulations on top of state and local rules. Section 404 requires a permit prior to the "discharge" of "dredged or fill materials" into "navigable water." Federal permits must be obtained through the U.S. Army Corps of Engineers (Corps), which has authority over maintenance of navigable waterways. Section 404 has been interpreted to require a permit before altering many properties with only the most tenuous connection to navigable waterways -- such as manmade ditches and impoundments created for stormwater control far from the nearest navigable body of water.

The US Supreme Court ruled in January 2001 (*Solid Waste Agency of Northern Cook County (or SWANCC) v. U.S. Army Corps of Engineers*) that the federal government does not have regulatory authority over many isolated waters and wetlands. In 2005 the Supreme Court accepted the appeal of two more wetlands cases; *Rapanos v. United States* and *Carabell v. United States*. Due to the multiple and conflicting opinions issued in *Rapanos/Carabell*, the Corps and the EPA in June 2007 issued a guidance document intended to bring consistency to questions of federal jurisdiction over various properties. Perhaps most important to retail real estate is the declaration that ditches and gullies that are not located in a wetland (often called "uplands") will not generally be covered by Section 404. The guidance rules currently are being reviewed by the EPA and the Corps.

Furthermore, Representatives James Oberstar (D-MN), John Dingell (D-MI) and Vernon Ehlers (R-MI) have reintroduced a bill (H.R. 2421: The Clean Water Restoration Act of 2007) that would expand federal jurisdiction to all wetlands and adjacent properties by eliminating the originally required connection to "navigable" waters. The companion bill (S. 1870) was introduced in the Senate by Sen. Russell Feingold (D-WI). ICSC opposes this approach.

Opposing Arguments:

Proponents of HR 2421 claim the legislation would merely restore federal jurisdiction to its status prior to *SWANCC* and *Rapanos*. Some others argue that expanding this federal program is necessary to prevent commercial development from destroying the nation's remaining wetland areas.

ICSC's Response:

Most of the nation's ecologically significant wetlands have been impacted by flood control projects along with forestry and agricultural practices (all of which were subsidized by earlier federal policy) -- not retail developments. Ironically, the Corps is one of the largest *destroyers* of wetlands in American history. Yet the proponents of HR 2421 claim that they intend to leave in place existing exemptions for agricultural and forestry activities -- thus placing much of the regulatory burden on the relatively small acreage involved in commercial and residential developments. Sound public policy would produce a streamlined procedure for identifying environmentally important wetland areas and economically appropriate methods to mitigate impacts. In addition, without a significant increase in resources for the Corps' regulatory efforts, any expansion in jurisdiction will simply compound the confusion and negatively impact state and local economies.

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