COMMON QUESTIONS:

WETLAND ASSESSMENT METHODS AND THE COURTS

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PREFACE

The following guide concerning wetland assessment is designed for lawyers, local, state, and federal government officials, the staffs of land trusts and other environmental organizations, consultants, and others working with wetland assessments in regulatory contexts. 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 summary is based on a more detailed legal report: Kusler, J. 2004. Wetland Assessment in the Courts. Association of State Wetland Managers, Inc., Berne, N.Y. http://www.aswm.org/pdf_lib/assessment_courts.pdf

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COMMON QUESTIONS:
WETLAND ASSESSMENT METHODS AND THE COURTS

Have the courts struck down any wetland assessment method?

A. Courts have not struck down any assessment method. The legal issue typically before the courts in a law suit challenging wetland regulations is the reasonableness of an agency's actions in refusing or conditioning a permit and not the validity, per se, of a wetland assessment method. Assessment methods have been mentioned in only a handful of more than 1,000 federal, state, and local wetland decisions to date. This does not mean that assessment methods including the types of data, scales and accuracy are legally unimportant. Courts do require regulatory agencies to follow data gathering procedures set forth in their enabling statute or regulations (e.g., mapping, notice and hearing, impact analysis, etc.). See discussion below. And, the outcome of every legal challenge to wetland regulations depends, to a considerable extent, upon the overall sufficiency of the data gathering and analytical processes employed by the regulatory agency.

For example, in one wetland case, a federal court of appeals held that the U.S. Army Corps of Engineers (Corps) issuance of a 404(b) permit was arbitrary and capricious because the Corps had failed to consider the impact of a proposed highway project on migratory birds. See Utahns v. United States DOT, 305 F.3d 1152 (10th Cir. 2002). The Corps argued that it had conducted an Hydrogeomorphic (HGM) analysis for the wetlands. The court had no problems with the Corps use of HGM method but, nevertheless, held that the Corps issuance of this was invalid because an assessment of project impact on migratory birds had not been achieved.

Wetland statutes and regulations set forth wetland definitions, wetland regulatory goals and criteria (e.g., no net loss, protection of fisheries), general tasks (mapping), and procedures for regulation and permitting. Information gathering and analysis (assessment) approaches must also provide the regulator with sufficient information to comply with these requirements.

Do wetland regulatory agencies have discretion in selecting among various assessment methods and procedures*?*

A. In general, yes. Courts have held regulatory agencies have wide discretion in choosing among technical procedures including assessment methods and techniques as long as the statutes or regulations do not require the use of a particular technique. If a specific technique is required, an agency must use it. However, even then, the agency would have some discretion with regard to scale and accuracy of information gathering. See Matter of Stone Creek Channel Improvements, 424 N.W.2d 894 (N.D. 1988) in which the court observed: "While an administrative agency is certainly bound by its own duly issued regulations…an agency nevertheless has a reasonable range of informed discretion in the interpretation and application of its own rules." Id. at 900. See also United States v. Deaton, 332 F.3d 698 (4th Cir. Md. 2003).

"…the outcome of every legal challenge to wetland regulations depends, to a considerable extent, upon the overall sufficiency of the data gathering and analytical processes…"

No federal, state or local wetland statute, administrative regulation or ordinance requires that a particular assessment wetland method be used, although a notice was published in the Federal Register in 1997 indicating an intent by the federal agencies to use the HGM over time.

That agencies have wide discretion in selection of wetland assessment methods and techniques does not mean, however, that a selected technique will develop all of the types of information needed by the regulatory agency. And, agency reliance on a single technique which fails to consider critical types of information may result in a successful legal challenge. See, e.g., Utahns decision (above).

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 procedures specified by statutes, administrative regulations, or ordinances. They must also apply the permitting criteria contained in statutes and regulations. Agency failure to follow regulatory procedures/ criteria has quite often been a successful ground for challenge to wetland regulations. Landowners usually win if regulatory agencies have clearly failed to comply with legally established procedural requirements. For example, see Free State Recycling Systems Corp. v. Board of County Comm'rs for Frederick County, 885 F. Supp. 798 (D. Md. 1994). See also Hirsch v. Maryland Dep't of Natural Resources, 416 A.2d 10 (Md. 1980) in which the Maryland Court of Appeals held that state wetland regulations were invalid as applied to specific landowners because wetland "orders and maps" had not been filed "among the land records in the county" as required by statute. Instead, the maps had been placed in a file cabinet drawer in an area inaccessible to the public or to title searchers.

However, few statutes contain highly specific assessment requirements. Agencies generally have broad discretion in selection of assessment approaches as suggested above. However, statutes and regulations do establish wetland definitions, and regulatory goals and criteria, which must be applied by regulatory agencies. In this way statutes and regulations indirectly require specific types of fact-finding and analyses. For example, certain wetland information is needed for a regulatory agency to legally assert jurisdiction over a permit application. A regulatory agency must typically determine whether a type of wetland is a "regulated" type consistent with the statutory wetland definition, whether the type of proposed activity is "regulated", and whether the proposed regulated activity lies within wetland boundaries. Fact-finding to apply wetland definitions and to gather other jurisdictional information is critical; without it, the agency cannot regulate an activity. See, for example, Coto v. Renfrow, 616 So.2d 467 (Fla. App. 1993) in which the court held that a regulator agency could not require permits for inland mangroves because the county code regulated only coastal wetlands. See also, State v. McCarthy, 379 A.2d 1251 (N.H. 1977), the New Hampshire Supreme Court held that land was not subject to a wetland permit, although it was adjacent to tidal water and within 3.5 feet of a mean high tide because wetland vegetation did not grow there. The statute defined wetlands in terms of vegetation and the court held that the state had not proved an "essential element of jurisdiction" by proving that some of the specified vegetation grew or was capable of growing there.

From a wetland assessment perspective, the need to follow regulatory procedures means that an agency must comply with any statutory or other formal administrative requirements for mapping, hearings, etc. An agency cannot simply decide not to map, if the statute requires maps. An agency cannot decide to forgo an environmental impact analysis, if the statute requires such analysis. Conversely, if an agency formally adopts an assessment method, it may be legally required to apply this method.

Do regulatory agencies need to be concerned about fact-finding on individual permits as well as overall factual support for the regulatory programs?

A. Yes. Courts first examine the overall constitutionality of wetland regulations. In this "overall analysis", they determine whether a regulation is constitutional, in a general sense, in terms of adoption in compliance with specified regulatory procedures, adequacy of regulatory goals, due process, and taking. Having decided that a regulation is, in general, valid, they then need to determine the validity of the regulation as applied to specific property. See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Nectow v. Cambridge, 277 U.S. 183 (1928). A regulation may be valid, in general, but not valid as to specific property.

What sorts of factual factors do courts consider in deciding whether a wetland permit has been validly issued or denied?

A. This depends upon the content of the regulations including the goals and standards and procedures for issuing permits. Courts typically consider scientific factors such as plant and animal species and the adequacy of impact reduction and proposed compensation in determining the adequacy of a permit decision. They also consider ownership of a parcel, the public "trust" interest, the existing and potential uses for the property, the economic viability of those uses, the size of the entire parcel, the landowners "expectations", the cost of the parcel, taxes and a broad range of other factors. Information gathering mechanisms must supply the wetland decision-maker with both scientific and other types of information.

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

Presumed to be correct

A. Yes. Courts have held that legislative and agency fact-finding and agency decisions on individual permits bear a strong presumption of correctness and the burden of proof is upon landowners to show incorrectness. In general, courts overturn agency fact-finding only if it finds that such fact-finding lacks "substantial evidence" (or some similar standard). See, for example, Samperi v. Inland Wetland Agency, 628 A.2d 1286, 1292 (Conn. 1993) in which the court held that a court must sustain an agency's determination if "an examination of the record discloses evidence that supports any of the reasons given…The evidence, however, to support any such reason must be substantial…." See also Lovequist v. Conservation Comm'n of Town of Dennis, 393 N.E.2d 858 (Mass. 1979); City of Chula Vista v. Superior Court of San Diego County, 183 Cal. Rptr. 909 (Cal. App. 1982); City of Alma v. United States, 744 F.Supp. 1546 (S.D.Ga. 1990).

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 (natural functions/values, natural hazards, infrastructure costs, etc.) 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.

Presumptions are important in wetland regulations. A general legal presumption in favor of the validity of wetland regulations support agency fact-finding. Because of the highly complex and dynamic nature of wetlands and the difficulties encountered in fact-finding with regard to wetland boundaries, natural hazards, public/private ownership boundaries, and wetland functions (processes), the presumption of correctness attached to agency decision-making becomes important. Such a presumption is difficult for landowners to rebut.

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. A regulatory agency need not accept one scientific opinion over another. For example, a New York Court in Chiropractic Ass'n of New York, Inc. v. Hilleboe, 187 N.E.2d 756 (N.Y. 1962), considered the effect of possible divergences in scientific opinion on facts which form the basis for exercise of the police power. It concluded: "It is not for the courts to determine which scientific view is correct in ruling upon whether the police power has been properly exercised. The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense". Id. at 757.

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

A. To meet due process and other constitutional requirements, the regulatory standards applied to wetlands must have a reasonable connection (nexus) to regulatory goals. Courts have, with very few exceptions, upheld resource protection regulations against challenges that they lack a reasonable nexus. See, for example, in Hallco Texas, Inc. v. McMullen County, 934 F.Supp. 238 (S.D.Tex. 1996) the court upheld regulations for solid waste disposal within three miles of lake as fairly debatable. See also City of Austin v. Quick, 930 S.W.2d 678 (Tex. App. 1996) in which the court upheld a city ordinance that regulated the amount of contaminants in runoff and the amount of impervious surface in a watershed area as not violating due process or equal protection.

Courts have upheld strong resource protection regulations like these wetland and water regulations in Massachusetts

Nevertheless, in light of two U.S. Supreme Court decisions in the last decade, courts are now examining the nexus for regulations, including conditions attached to permits, with increasing care. In the first decision, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), the Court held that requiring dedication of a beach access easement was not reasonably related to regulatory goals. In the second, Dolan v. City of Tigard, 512 U.S. 374 (1994), the court held that requiring dedication of a floodplain easement was not justified as roughly proportional to the impact of the proposed activity. More specifically, the court stated: "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." Id. at 391.

In general, courts have required a stronger showing of nexus and proportionality where regulations have severe economic impact on landowners. This has wetland assessment implications. In general, the detail and accuracy of information gathering, such as mapping, delineation and documentation of functions (e.g., flood conveyance), should increase as the severity of impact of the restriction on landowners increases.

Courts are also requiring that regulatory agencies show that conditions requiring dedication of lands are "roughly proportional" to the impacts posed by the proposed activity. 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 "no net loss" or other regulatory goals.

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

Field surveys

A. No. Courts have broadly upheld conservancy zoning for wetlands and other types of 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. They have also sustained agency adoption of broad, multobjective wetland case-by-case permitting approaches without determination of the functions and values of individual wetlands. However, courts have required regulatory agencies 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.

No court has struck down wetland regulations for failing to distinguish between the ecological value of various types of wetlands. Failure to distinguish was challenged in the New Hampshire Supreme Court case, Rowe v. Town of North Hampton, 553 A.2d 1331(N.H. 1989). The court in this case sustained the denial of variance to construct a house and septic system in a wetland against a takings challenge and rejected arguments that regulations should distinguish wetlands which have great ecological value from those which do not. The court observed, in so holding, that:

> We find no error in the trial court's decision that no taking has occurred in this case. We hold that the wetlands ordinance is neither unreasonable by itself nor unreasonable as applied to plaintiff's land. The plaintiff's argument that the town's regulations are arbitrary, because they allegedly do not distinguish wetlands which have great ecological value from those that do not, is without merit…(T)he plaintiff's real complaint is that the town's definition of wetlands should be changed. We see nothing unreasonable or arbitrary about the town's use of the terms "poorly drained" and "very poorly drained" soils to determine what constitutes a wetland…nor does the plaintiff offer any authority for her proposition that the ordinance, to be constitutional, must grade wetlands according to their ecological value. Any changes in definitions contained in the town's ordinances should be sought through proper local channels, not in this court….

Id. at 1336.

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 determination of the adequacy of impact reduction and compensation measures. 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 to limitations on staffing and time, 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 the specific context. 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?

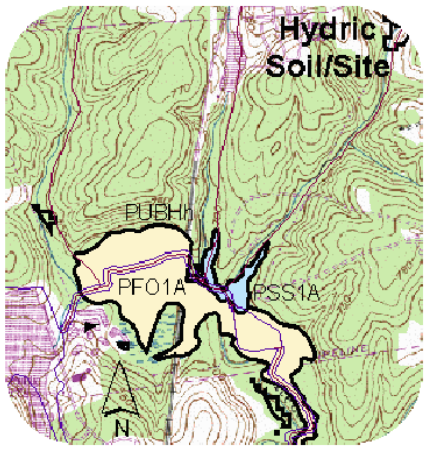
A. Agencies can, in general, use many types of information to assess wetlands for regulatory purposes, depending on the regulatory criteria, goals and other factors. Agencies may use air photos, wetland maps, reports and information prepared by other agencies, field surveys by staff, opinion evidence 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 and analyses processes.

Agencies often use the field observations of expert staff. Direct observations of wildlife, soils, hydrology and other wetland features are particularly persuasive evidence in court. In United States v. Weisman, 489 F. Supp. 1331 (D.Fla. 1980), the court upheld the Corps' determination that an area was wetland, based on observation and the conduct of transects:

> The lowland portion of the Weisman property is correctly described as an evanaged, flat-top, flood-plain wetland forest. This description was based upon an intensive, two-day inspection by Mr. Lazor, who is familiar with the definition of wetlands. He testified, based on personal vegetation surveys, that wetland vegetation was located in abundance on the lowland portion of the property.... His survey involved nine transects in which he identified trees, shrubs, and herbaceous species at 20-foot intervals and computed the statistical frequency ...

Id. at 1339.

See also State v. A. Capuano Bros., Inc., 384 A.2d 610 (R.I. 1978) in which the Rhode Island Supreme Court sustained the designation of a property as wetland based on the "uncontroverted testimony of two witnesses...." The court observed that:



Wetland mapping

> Martin Probney, a hydrologic engineer with the Soil Conservation Service of the United States Department of Agriculture, testified that the subject property was a wetland for it lay within the 50-year floodplain of the Meshanticut Brook. He testified at some length regarding how the 50-year floodplain was identified and what some its characteristics are. Goodwin, another expert, also identified both parcels as fresh water wetlands. As noted above, this evidence was not discredited either by other positive testimony or by circumstantial evidence, extrinsic or intrinsic. Evidence of this character is ordinarily conclusive upon the trier of fact.

Id. at 613.

Other sorts of information may be used as well. For example, agencies can use aerial photos to help identify, delineate and assess wetlands, and enforce regulations. See, for example, State v. A. Capuano Bros., Inc. 384 A.2d 610 (R.I. 1978) in which the Rhode Island Supreme Court generally endorsed the Department of Natural Resources' use of aerial photos to identify wetland boundaries. See also Dow Chemical Co. v. United States, 749 F.2d 307 (6th Cir. 1984) The U.S. Environmental Protection Agency did not exceed its authority or 4th Amendment guarantees by using aerial photos for surveillance of a chemical plant. Callison v. Land Conservation and Dev. Comm'n, 929 P.2d 1061 (Or. App. 1996) City's use of aerial photos to locate watershed area was valid. Downer v. United States Dep't of Agric., Soil Conservation Serv., 894 F.Supp. 1348 (D.S.D. 1995) Soil Conservation Service reliance on aerial photos to determine that an area was subject to Swampbuster was reasonable.

Agencies can, under many circumstances, use reports and information prepared by other agencies. See, for example, Moore v. Illinois Pollution Control Bd., 561 N.E.2d 170 (Ill. App. 1990), in which the court held that a county board's determination that landfill was outside the 100-year floodplain, based on a Department of Transportation determination, was not against "manifest weight of evidence." Id. at 177. See also State v. City of LaCrosse, 354 N.W.2d 738 (Wis. App. 1984) in which the court held that state flood evidence was relevant to local floodplain zoning.

Agencies can also use non-expert sources of information in permitting and in court, such as layperson observations of fish, wildlife or other features. See, for example, Metropolitan Dade County v. Blumenthal, 675 So.2d 598 (Fla. App. 1995) in which the court held that "There are instances where lay persons are just as qualified as expert witnesses to offer their views on certain matters. For example, a lay person is just as qualified as an 'expert witness' to testify to natural beauty." Id. at 601. See also Georgia v. City of East Ridge, 949 F.Supp. 1571 (N.D.Ga. 1996). Court could rely on eyewitness observations of sewage and to determine that unnamed tributary was navigable water where it intersected the creek that flowed into another state.

Opinion evidence of experts in environmental planning or ecological sciences is also a permissible basis for regulatory decision-making. See, e.g., City of Chula Vista v. Superior Court of San Diego County, 183 Cal.Rptr. 909 (Cal.App. 1982). See also City of San Diego v. California Coastal Comm'n, 174 Cal.Rptr. 5 (Cal.App. 1981). Coastal Southwest Development Corp. v. California Coastal Zone Conservation Comm'n, 127 Cal. Rptr. 775 (Cal.App. 1976).

As one might expect, agencies and courts give particular weight to expert testimony on technical subjects. See, for example, Loesch v. United States, 645 F.2d 905 (Ct. Cl. 1981), a case involving government liability for causing erosion on private lands by construction and operation of navigational locks. The court observed:

> Erosion on rivers and streams is an extremely complex matter from the point of view of its genesis, its effects and its prevention. Why some banks erode and other similar ones do not is not fully known. A number of variables are involved in the erosion process and these variables may exert their influence individually or in a complex combination, in which case erosion becomes more difficult to understand, predict, and treat. In short, the cause(s) of erosion cannot be reduced to simple answers. As a result, these are cases where the testimony of experts is particularly appropriate since the trier of fact is presented with evidence of a highly technical nature involving geotechnical, hydrologic, hydraulic, geological, and climatic matters.

Id. at 914.

Expert testimony is needed in administrative proceedings and cases where the facts and circumstances, including the inferences to be drawn from these, exceed the understanding and average experience of the layperson.

The major difference between the way the testimony of a lay witness and an expert is treated in a wetland case is that the lay witness may only attest to his or her direct observations, while an expert may give opinions or draw inferences from the facts, which an agency, court or jury would have difficulty evaluating due to its lack of specialized training. Experts may testify as to causation and "express an opinion upon the very issue before the jury." Schweiger v. Solbeck, 230 P.2d 195, 203 (Or. 1951).

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 specific agency environmental impact statements (required at the federal level for some Section 404 permits and at the state level for wetland permits in many states) are invalid 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. See, e.g., Reuter v. Department of Natural Resources, 168 N.W.2d 860 (Wis. 1969) (Department of Natural Resources must make a specific finding concerning the potential water pollution efforts of a proposed dredging project pursuant to a statute requiring a "public interest" review). See also Houslet v. State Dep't of Natural Resources, 329 N.W.2d 219 (Wis. App. 1982). See Town of Centerville v. Department of Natural Resources, 417 N.W.2d 901 (Wis. App. 1987) in which a Wisconsin appellate court held that the Wisconsin Department of Natural Resources had not carried out an adequate preliminary factual evaluation of the impact of a proposed landfill upon wetlands.

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. See, for example, A.H. Smith Sand & Gravel Co. v. Dep't of Water Resources, 313 A.2d 820 (Md. 1974) in which a Maryland court upheld a state statute requiring permits for activities in the 50-year floodplain, but held that maps defining the floodplain had been too broadly drawn. The court held that it was necessary to revise earlier maps in light of the flood experience of Hurricane Agnes.

See also City of Carmel-by-the-Sea v. United States Dep't of Transp., 95 F.3d 892 (9th Cir. 1996) in which the court held that agency reliance on "stale" wetland scientific information was inadequate for environmental impact analysis purposes and required a new impact statement; Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437 (4th Cir. 1996) (Agency must look at new circumstances in deciding whether to conduct supplementary E.I.S.).

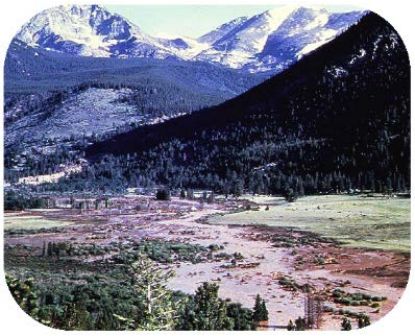
May a regulatory agency be liable if it fails to assess the flooding and erosion impact of a proposed wetland alternation on other lands?

A. Governmental units may be held liable to adjacent landowners, in certain circumstances, for issuing wetland permits where issuance of permits causes flooding, erosion, or other damage to other properties. For example, in Hurst v. United States, 739 F.Supp. 1377 (D.S.D. 1990) the Corps was successfully sued by private landowners for flood and erosion damage that resulted from the Corps' issuance of a Section 10 and 404 permit for construction of jetties in a river. The court held that the Corps had negligently supervised the project and failed to issue a prohibitory order to prevent the activities causing the flood and erosion damage.

See Annot., "Liability of Government Entity for Issuance of Permit for Construction Which Caused or Accelerated Flooding", 62 A.L.R.3d 514 (1975) and many cases cited therein. See, for example, Cootey v. Sun Inv., Inc., 690 P.2d 1324 (Haw.App. 1984) in which a Hawaii court held that a county may be liable for approving a subdivision with inadequate drainage: "(I)n controlling the actions of a subdivider of land, a municipality has a duty not to require or approve installation of drainage facilities which create an unreasonable risk of foreseeable harm to a neighboring landowner, and where a breach of that duty is established, a municipality may be held liable for consequential damages". Id. at 1332. See also City of Columbus v. Smith, 316 S.E.2d 761 (Ga.App. 1984) (City may be held liable for approving construction project resulting in flooding); Pickle v. Board of County Comm'rs of Platte, 764 P.2d 262 (Wyo. 1988) (County had a duty to exercise reasonable care in reviewing subdivision plan).

Are some types of information considered more important by the courts than others in deciding whether regulations "take" private property?

A. Certain types of wetland assessment information may be more important than others in meeting legal challenges and regulatory agencies need flexibility in deciding what information is most important in a particular instance. For example, wetland "jurisdictional" information is essential to a regulatory agency to assert regulatory powers over a proposed activity.



Courts strongly support prevention of nuisances

Courts have given different "weights" to various wetland regulatory objectives in deciding whether regulations "take" property, as will be discussed below. Courts give great weight to prevention of nuisances and prevention of threats to public safety. Therefore, documentation of natural hazards and the possible nuisance impacts of activities is particularly important in wetland assessment for a permit application where a "takings" claim is possible or likely. Courts have broadly and universally upheld regulations where proposed activities threatened safety, created nuisances, or infringed on public rights (e.g., publicly owned lands). See, for example, New Jersey Builders Ass'n v. Department of Envtl. Protection, 404 A.2d 320 (N.J. App. 1979), in which the court upheld actions of Department of Environmental Protection in establishing water quality standards for the Central Pine Barrens and designating such lands as a "critical area" for sewerage purposes. The court noted that "Statutes which are enacted for the protection and preservation of public health are to be construed liberally." Id. at 329.

Evidence of inadequate soils for septic tanks/soil absorption fields and possible resulting pollution has been given great weight by courts. See, e.g., Saturley v. Town of Hollis, 533 A.2d 29 (N.H. 1987), in which the New Hampshire Supreme Court held that denial of a variance for a septic tank in a wetland was reasonable based upon pollution concerns; Santini v. Lyons, 448 A.2d 124 (R.I. 1982) (Denial of permit for fill and septic tank in salt marsh upheld, in part, due to pollution concerns); Milardo v. Coastal Resources Mgmt. Council, 434 A.2d 266 (R.I. 1981) (Denial of a permit for construction of sewage disposal system in a marsh upheld).

Efforts to prevent increased flood damage and erosion damages from changes in hydrology have also been broadly endorsed. See, e.g., Michelson v. Warshavsky, 653 N.Y.S.2d 622 (A.D. 1997) (Denial of permit to subdivide valid based upon threat of flooding); Eastbrook Construction Co., Inc. v. Armstrong, 205 A.D.2d 971 (N.Y. 1994). (Town planning boards' rejection of permit application for alteration of wetland was validly based upon findings that proposed construction would lower water table and possibly eliminate wetland).

Ecological information has been considered of importance by many courts. See, e.g., Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970). Recreational, cultural and scenic values have also been considered important. See Menomonee Falls v. Department of Natural Resources, 412 N.W.2d 505 (Wis.App. 1987) (Court sustained Wisconsin Department of Natural Resources denial of four permits for village's channelization project involving creek, based, in part, upon adverse aesthetic impacts. The court noted that "enjoyment of scenic beauty is one of the paramount interests appurtenant to navigable waters….") Id. at 517.

However, courts have not usually given ecological condition, aesthetics and cultural values as much weight as protection of public safety and prevention of nuisances because the latter "go to the heart" of a landowner's property rights and courts have held that landowners have no property right to threaten safety or cause nuisances.

Does prior community-wide information gathering and comprehensive planning help meet legal challenges?

A. Yes, in some instances. Federal wetland regulatory statutes and administrative regulations do not require area-wide comprehensive information gathering or planning prior to adoption of regulations. Nor do state and local wetland regulatory statutes and regulations require prior comprehensive planning. However, many local zoning enabling statutes require that zoning regulations be in accordance with a comprehensive plan. And, local wetland conservation zoning is often adopted pursuant to such broader statutes. Courts have traditionally found such a comprehensive plan contained within the zoning regulations but this is changing as state legislatures mandate independent planning in some states. However, no court has apparently held invalid local wetland zoning regulations for failure to be in accordance with a comprehensive plan.

Although community comprehensive planning by may not be required prior to adoption of wetland regulations, comprehensive planning can help support the reasonableness and overall legal validity of regulations. See, for example, Wilson v. County of McHenry, 416 N.E.2d 426 (Ill. 1981) in which the court held that "(t)he adoption of a comprehensive plan which incorporates valid zoning goals increases the likelihood that the zoning of a particular parcel in conformity therewith is not arbitrary or unrelated to the public interest." Id. at 431. See also Harvard State Bank v. County of McHenry, 620 N.E.2d 1360 (Ill. App. 1993); McCarthy v. City of Manhattan Beach, 264 P.2d 932 (Cal. 1954):

> A) zoning ordinance enacted pursuant to a comprehensive plan of community development, "when reasonable in object and not arbitrary in operation," will be sustained as a proper exercise of the policy power, every intendment is in favor of its validity; and a court will not, "except in a clear case of oppressive and arbitrary limitation," interfere with legislative discretion.

Id. at 935.

See also, Harvard State Bank v. County of McHenry, 620 N.E.2d 1360, 1362 (Ill. App. 1993) (Court held that factors relevant to reasonableness of regulations included "the care with which the community has undertaken the planning of its development…."; Consolidated Rock Products Co. v. City of Los Angeles, 370 P.2d 342, appeal dismissed, 371 U.S. 36 (1962) (Court upheld very tight regulations based upon overall planning.); Reahard v. Lee County, 30 F.3d 1412 (llth Cir. 1994) (Resource conservation district); City of Key West v. Berg, 655 So.2d 196 (Fla. App. 1995) (Comprehensive plan limiting wetland development not ripe for "taking" claim.).

Courts, over the period of years, have also provided strong support for state resource management regulatory approaches based upon regionally-based land and water assessments and planning approaches. See generally, North Shore Unitarian Soc'y, Inc. v. Village of Upper Brookville, 493 N.Y.S.2d 564 (A.D. 1985); Island Properties, Inc., v. Martha's Vineyard Comm'n, 361 N.E.2d 385 (Mass. 1977) (Regional planning and regulation for Martha's Vineyard); New Jersey Builders v. Department of Envtl. Protection, 404 A.2d 320 (N.J. App. 1979) (Court upheld regionally-based actions of Department of Environmental Protection in establishing water quality standards for the Central Pine Barrens and designating such lands as "critical area" for sewerage purposes).

Does an agency need to eliminate uncertainties in fact-finding and analysis?

A. Courts have held that agencies do not need to eliminate uncertainty in fact-finding. See City of Alma v. United States, 744 F.Supp. 1546 (S.D. Ga. 1990); See also Northwest Envtl. Defense Ctr. v. Wood, 947 F.Supp. 1371, affirmed, 97 F.3d 1460 (D. Or. 1996), in which the court held that scientific studies supported the Corps' opinion in a wetland case despite counter studies and held that a reviewing agency need not eliminate all uncertainty.

Are ecological assessment models based solely on remote sensing a substitute for on the ground information gathering?

A. Ecological assessment models based entirely or almost entirely on remote sensing data rather than actual on the ground observation of particular plan t and animal species may encounter legal problems. The use of general habitat models rather than in the field information gathering to help decide whether a permit should be issued and the adequacy of impact reduction and compensation measures is less expensive for landowners/consultants and regulatory agencies. But habitat models are also subject to inaccuracies and may not accurately project actual use of areas by particular species.

On the ground assessments are often needed for endangered species

In one case, Sierra Club v. Glickman, 974 F.Supp. 905 (E.D. Tex. 1997), a federal district court held that the USDA Forest Service (Forest Service) had not adequately carried out its responsibilities pursuant to the National Forest Management Act in "inventorying and monitoring" the wildlife resource. The court held that the Forest Service's use of a computer-generated model that utilized forest management and condition to assess the capability of the forest habitat to support certain species was not adequate:

> With respect to the Forest Service's inventorying and monitoring obligations, the Forest Service is not collecting population data on wildlife to ensure viable populations. The Forest Service instead is relying on hypothetical models to assess habitat capability and then assuming that viable populations of species are in existence and well-distributed on the forest land. The Forest Service's failure to collect population data forecloses its ability to evaluate forest diversity in terms of wildlife and to adequately determine the effects of its management practices.
>
> Id. at 911, 912.

See also House v. Forest Service, 974 F. Supp. 1022 (E.D. Ky. 1997). See Utahns v. United States DOT, 305 F.3d 1152 (10th Cir. 2002) in which the court held that the Corp's issuance of a 404(b)permit was arbitrary and capricious because the Corps failed to consider the impacts of a proposed highway on migratory birds.

Do regulatory agencies need to determine the impact of proposed activities upon particular types of plants and animals?

A. In general, state and federal statutes and regulations do not specifically require that state and federal agencies consider the impact of proposed permits upon particular types of plants and animals except for endangered species. However, failure to consider impacts may be considered unreasonable in a specific circumstance. See, for example, Utahns v. United States DOT, 305 F.3d 1152 (10th Cir. 2002) in which the court held that the Corp's issuance of a 404(b) permit was arbitrary and capricious because the Corps failed to consider the impacts of a proposed highway on migratory birds. Wetland assessment methods which do not consider specific species may in some circumstances, be supplemented by other information gathering methods and procedures.

Failure to consider possible impacts on species of plants or animals is a particular problem if rare or endangered species may be present. Courts have held that agencies should "place conservation" of endangered species above "other interests and undertake particularly careful data gathering." See House v. Forest Service, 974 F.Supp. 1022 (E.D. Kent. 1997) (Court held that forest management plan failed to provide adequate protection for the Indiana Bat).

Many courts have required careful date gathering to comply with the Endangered Species Act. See, for example, Mountain Lion Found. v. Fish and Game Comm'n, 51 Cal. Rptr. 2d 408 (Cal. App. 1996). (Delisting of mojave ground squirrel as threatened species is significant action requiring environmental impact statement); City of Chula Vista v. California Coastal Comm'n, 183 Cal. Rptr. 909 (Cal. App. 1982) (Court sustained a decision of the California Coastal Commission to disapprove Chula Vista's local coastal program based, in part, upon the Commission's determination that partly impacted urban wetlands were, ecologically valuable and in need of protection. Endangered species were potentially involved).

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Much descriptive information and many links.

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http://www.law.cornell.edu/opinions.html
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