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Heightened Army Corps scrutiny of projects involving minimal wetlands impacts in Conn.

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In recent months the Army Corps of Engineers has increased scrutiny of projects involving seemingly little or no wetlands impacts based on concerns related to secondary impacts to wetlands.

The process for federal Army Corps of Engineers approval of minimal impacts to wetlands was streamlined in 2006 with the issuance of a programmatic general permit designed to avoid the need for an individual permit under the Clean Water Act for certain modest wetland impacts. That general permit, the "PGP," established two categories of wetlands impacts that were exempted from the full individual permit process. Category 1 applies to certain projects having less than 5,000 s/f of wetlands impacts and Category 2 involves impacts of between 5,000 s/f and one acre.

Projects qualifying under Category 1 can proceed without any project review or ratification of compliance by the Corps. As long as an established list of criteria is satisfied, the project can proceed as soon as applicable state and local approvals are issued. The Category 2 projects require inter-agency review by the Corps, the Connecticut Department of Environmental Protection, the U.S. Fish and Wildlife Service and the U.S. Environmental Protection Agency. That process can take several months to more than year.

Recently the Corps has trended toward a broad interpretation of certain criteria of the Category 1 PGP to exclude projects that might otherwise be expected to qualify under the standards established in the permit. The determination that projects involving very small amounts of direct wetlands impact do not qualify for the Category 1 classification and the associated privilege to start work immediately usually hinges on the fact that the 5,000 s/f impact limit must include the area subject to "secondary impacts" from the project. The PGP also excludes from Category 1 projects that have any amount of secondary impacts to special wetlands such as bogs, cedar swamps and vernal pools.

Whether upland development involves secondary impact to wetlands can be very subjective under the PGP Program permit. It is becoming more common for the Corps to conclude that developments having substantial grading and filling of uplands in relative close proximity to wetlands are considered to have "secondary" impact to wetlands and watercourses regardless of municipal determinations and underlying expert reports presented to the municipal commissions that no adverse impacts would result from the project. Unlike decisions of municipal wetlands agencies, there is no right to appeal a judgment of the Corps that secondary impacts may result from the upland development and there is no specific requirement that the Corps have substantive scientific analysis to support its judgment that secondary impacts will occur.

This is not welcome news for developers who in recent years have gained some protection from the Connecticut courts to challenge adverse decisions of municipal wetlands agencies finding

secondary impacts to wetlands when their finding of secondary impacts is not actually supported by evidence. That trend toward requiring tangible evidence of impacts in Connecticut wetlands permitting is of little help if the Corps determines that the uplands activities will result in secondary wetlands impacts.

The Corps has been informing local land use commissions in Connecticut that applicants can consult with the Corps to confirm that projects having less than 5,000 s/f of direct impacts qualify for the Category 1 classification. With that knowledge, some municipal commissions are requiring applicants to make that inquiry with the Corps.

Faced with this closer scrutiny, developers face hard choices in projects having modest direct wetlands impacts. The project developer could directly consult the Corps with a plan backed by expert reports tailored to the criteria of the PGP, particularly with respect to the question of secondary impacts and avoidance of impacts to special wetlands. The other choice is go ahead with the project without consultation with the Corps based on the good-faith belief that the requirement that the project proposes fewer than 5,000 s/f of direct and secondary impacts and otherwise meets the requirements of the PGP.

A project team would be well served to account for this heightened scrutiny by involving the Corps early in the project to obtain feedback with respect to avoidance of secondary impacts or to at least undertake carefully documented due diligence to support a determination that the plan can proceed under the PGP without further consultation with the Corps.

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