



In the next
Carlson Report:
Environmental
Insurance

Wetlands Mitigation

The "No Net Loss" Policy

Development and wetlands are like oil and water. They just don't mix very well. So when human activity interferes with wetlands, these natural areas need protection. That's where Section 404 of the Clean Water Act comes into play. It's the federal government's way to ensure a "no net loss" policy towards the country's remaining wetlands.

It wasn't always this way. Before the Clean Water Act of 1975, the government had virtually no restrictions on filling wetlands. And as recently as 10 years ago, a private party could fill up to 10 acres of wetlands without a permit.

But public policy has shifted and strict rules now safeguard wetlands. However, on January 9, 2001, the U.S. Supreme Court ruled that the federal Clean Water Act should not prevent suburban localities from building a landfill atop seasonal ponds, used by migratory birds. This ruling may change the Corps' jurisdiction over isolated wetlands.¹

The Value of Wetlands

In identifying wetlands, the U.S. Army Corps of Engineers evaluates three criteria:

- *plants that thrive in wet, oxygen-depleted soils*
- *the presence of hydric soil, and*
- *evidence of periodic flooding*

These wetlands provide more than a habitat for an array of plants and animals. They also serve a valuable economic function:

Flood Protection: Wetlands act like a sponge, absorbing rainfall during heavy rains and releasing excess water during drier periods.

Sediment Control: Wetlands vegetation greatly reduces the velocity of water flow, allowing suspended materials to settle.

¹ See "Court Limits Federal Law in Bartlett Landfill Case." The Chicago Tribune, January 9, 2001.

Pollutant Removal: Microorganisms digest pollutants; plants filter toxic substances; and invertebrates process wastes.

Section 404 Permit

The Clean Water Act mandates that any development that damages or destroys wetlands must be authorized in advance through a Section 404 permit. In order to obtain a 404 permit, the applicant must establish that:

- *The project is not feasible without developing on wetlands*
- *Everything has been done to minimize building on the wetlands*
- *Compensation for unavoidable impacts will be made*

Small Impacts: Projects affecting 1/4 acre of wetland or less generally fall under Category I of the Chicago District's Regional Permit (RP) program. These generally do not require mitigation and take 2-4 months to process after submission.

Bigger Impacts: Projects impacting 1/4 acre to 2 acres generally fall under Category II of the RP program and require mitigation. This permit typically takes 5-7 months to process.

For projects that do not fall under the RP program (e.g. projects that impact >2 acres, projects that involve high quality wetlands, etc.), an individual permit is required. The process involves a 6-week public comment period and can take up to one year or longer.

These time estimates can be swifter if wetlands credits are being considered. While few permits are denied, applications often require significant modifications.

Wetland Mitigation Strategies

Wetlands mitigation can be done **on-site**, an approach usually preferred by the Corps, or **off-site**, in which case the permit holder must acquire land for mitigation. A second course of action, subject to Corps approval, is for the permit holder to make payments to a third party. These options are detailed below.

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Strategy #1: “Do It Yourself”

On-site and off-site wetland mitigation can take three forms: **restoration**—recreating a wetland destroyed or drained for other uses such as farming, **rehabilitation**—enriching the plant community of an existing wetland, or **creation**—building new wetlands.

For any of these scenarios, the permit holder must complete the following steps:

1. *Select a site and complete a feasibility analysis*
2. *Develop a conceptual design for regulatory review*
3. *Prepare construction design drawings*
4. *Select a contractor and oversee construction*
5. *Submit a final report to demonstrate permit compliance*
6. *Complete annual monitoring reports for a 3 to 5 year period*
7. *Repair and replant if standards are not met*

For the “Do It Yourself” method of wetlands mitigation, total costs typically range between \$40-\$100,000 per acre. This expense is divided between land acquisition, restoration costs, and management and monitoring.

Strategy #2: “Pay Someone Else”

Subject to Corps approval, a permit holder may satisfy wetlands mitigation requirements by making payments to a private wetlands bank or in certain cases a wetlands fund. These entities, which must satisfy performance standards set forth by the Corps, assume responsibility for the success of the wetlands mitigation action.

Option #1: “Buy Wetlands Credits”

Wetlands banks create, manage, and own large tracts of wetlands that are under deed restriction. One acre in a Corps approved wetlands bank equals one credit that can be sold on the market. Credits are subject to supply and demand and may not always be available for purchase.

The price of credits will vary according to the particular watershed and operating expenses related to restoration and management of the site. Expect to pay anywhere between \$40,000 and \$65,000 per acre. DuPage County charges \$175,000 per acre for its in lieu payment program.

Typically, a permit holder must purchase credits from an approved bank operating in the same watershed as the impact. At the county level, a DuPage County ordinance prohibits “cross watershed” sales. Kane County and Lake County have followed suit.

Wetlands credits are popular for a number of reasons:

Efficiency: Filing an application for credits is easier and cheaper than designing a full-scale mitigation plan.

Predictable costs: With wetlands credits, the permit holder pays a one-time cost with no future unexpected costs.

No lag time. With credits, the mitigation is immediate because the bank already has approved deed-restricted wetlands. These credits are protected forever.

Option #2: “Make In Lieu Fee Payments”

Another option for permit holders is to make a payment into the Wetlands Restoration Fund subject to Corps approval. The Corporation for Open Lands (which administers the Fund on behalf of the Corps) serves all five major watersheds. Costs for credits average between \$40-\$43,000 depending on the watershed.

When a permit holder makes an in lieu payment, the Corlands identifies and funds mitigation proposals. In 1999, Corlands provided grants to restore and enhance 86 acres of wetlands.

For More Information

To learn more about wetlands mitigation visit the Chicago District’s extensive web site. www.lrc.usace.army.mil/co-r/overview.htm. Also check with the Corps about potential regulatory changes in light of the recent Supreme Court ruling in the Bartlett Landfill Case. Army Corps regulatory specialists are listed below:

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