



New Hampshire BAR ASSOCIATION

Equal Justice Under Law

www.nhbar.org

Home

Google™ Custom Search

Go

About the Bar

For Members

For the Public

Legal Links

Publications

Newsroom

Online Store

Vendor
Directory

NH BAR FOUNDATION

Judicial Branch
Division of the State

NHMCLE
SC RULE 53

Need a Lawyer?

Law-Related
Education

NHBA
CLE

NHBA Insurance
Agency

Member Login

Username

Password

Login

Member Login Required for Casemaker



Bar News - September 20, 2013

Environmental, Natural Resources & Utilities Law: Wetlands Mitigation: Changes on the Horizon

By: **Dana Bisbee and Kevin Baum**

Environmental law and land use practitioners have learned the three-part harmony of the wetlands regulatory regime: avoid wetlands impact; minimize unavoidable impacts; and mitigate for permitted impacts. Each part presents challenging regulatory questions, orbiting the central question of how much avoidance, or minimization, or mitigation is enough.

Compounding the challenge is the overlapping state-federal jurisdiction over most wetlands.

With regard to the mitigation requirement, three recent developments could bring significant changes for those whose work involves navigating the complex regulatory landscape of wetlands permitting.

Federal vs. State Mitigation

Federal and state regulations provide for two compensatory mitigation options:

- (1) Activities for which the permittee is responsible, such as on- or off-site wetlands preservation, restoration or creation
- (2) Third-party mitigation, such as an in-lieu fee or wetlands mitigation bank.

The federal approach through the US Army Corps of Engineers is to give preference to third-party mitigation (40 C.F.R. 230.93), while state regulations allow the use of third-party mitigation, only after permittee-responsible activities have been considered and determined not to be feasible. Env-Wt 801.03.

In practice, NHDES is inclined to work with applicants constructively on third-party mitigation options – especially with in-lieu fee payments to the Aquatic Reserves Mitigation Fund – to avoid harsh and unnecessary results, due to this regulatory inconsistency.

Moreover, the vast majority of federal wetland permits are issued in conjunction with the state permit under the New Hampshire PGP.

New England General Permit Proposed

The newest change on the federal permitting front relates to the Programmatic General Permit (PGP). The PGP is the federal general permit designed to be used in place of an individual permit under Section 404 of the Clean Water Act (and related federal laws). It is used in all but the most significant wetlands permitting proceedings in New Hampshire.

This summer, the US Army Corps of Engineers proposed a new, completely revamped general permit covering, for the first time, all of the New England states. Due to the large number of questions, concerns and comments about this new draft, the comment period has already been extended once, and there are now calls for the Army Corps to withdraw its current proposal.

Two issues of concern relate to the mitigation requirement in this proposed new PGP. One is an express requirement that an applicant “consider” best management practices for low-impact development. (§IV (4)(K) at p. 25).

A second significant issue in the draft New England-wide PGP relates to vernal pools. Of particular note is the potential regulatory coverage – including mitigation requirements – of the “critical terrestrial habitat” defined as within 100-750 feet of the edge of the vernal pool. (§VI, definition of vernal pool, at p. 47). If applied strictly (you do the math), this could require mitigation for an area as large as 40 acres – for a single vernal pool! This new proposal merits very careful scrutiny going forward.

DES Rules Review

In another regulatory development, the New Hampshire Department of Environmental Services (DES) is undertaking a comprehensive review of its wetlands rules and plans to move forward next year with proposed changes in all regulatory areas, including compensatory mitigation.

This effort is still in the early stages, so it is too early to address any specific issues. But, we should all look for these proposed changes from DES as early as the end of this year and engage with the agency as they move

Depression...Alcoholism...
Addiction...Personal or
Professional Crises...

Support for
NH Attorneys,
Judges, Law
Students

Meaningful
Assistance

Outreach
&
Education

Strictly
Confidential

NH Lawyers Assistance
can help you put the
pieces back together.
877-224-6060

Rules of the Road

NH Bar's
Litigation
Guidelines

forward with this rules initiative.

US Supreme Court's Koontz Decision

Last, we address here the US Supreme Court's June 25 decision in *Koontz v. St. John's River Water Management District*. In that case, the Court held that the "nexus" and "rough proportionality" tests under the "unconstitutional conditions doctrine" apply to both (1) the denial of a wetlands permit (as the practical and legal equivalent of an unacceptable permit condition), and (2) a monetary exaction, such as an in-lieu fee for wetlands impacts.

Requiring a "nexus" and "rough proportionality" between the in-lieu fee – what the Court acknowledged as a commonplace regulatory tool (slip opinion at 15) – and the effects of the wetlands impacts under the unconstitutional conditions doctrine may seem reasonable, if not innocuous. But the four dissenting justices and various commentators have raised concerns about the application of the heightened scrutiny applied in "takings" (5th Amendment) cases to the imposition of in lieu fee-type monetary conditions.

Whether the Koontz decision "threatens the heartland of local land-use regulation," as Justice Kagan suggests (Dissenting Opinion at 12), remains to be seen. But the Court's decision in Koontz unquestionably adds additional regulatory uncertainty into the already difficult area of wetlands regulation.

Dana Bisbee is an attorney with Devine, Millimet & Branch in Manchester and is the Chair of the firm's Environmental Practice Group. He may be reached at dbisbee@devinemillimet.com.

Kevin Baum is an attorney with Devine, Millimet & Branch in Manchester and is a member of the Environmental, Regulated Utilities and Real Estate Practice Groups. He can be reached at kbaum@devinemillimet.com.



[Home](#) | [About the Bar](#) | [For Members](#) | [For the Public](#) | [Legal Links](#) | [Publications](#) | [Online Store](#)
[Lawyer Referral Service](#) | [Law-Related Education](#) | [NHBA•CLE](#) | [NHBA Insurance Agency](#) | [NHMCLE](#)
[Search](#) | [Calendar](#)

New Hampshire Bar Association
2 Pillsbury Street, Suite 300, Concord NH 03301
phone: (603) 224-6942 fax: (603) 224-2910
email: NHBAinfo@nhbar.org
© NH Bar Association [Disclaimer](#)