



#### INTRODUCTION

Pacific Legal Foundation (PLF) is a nonprofit, public interest law firm based in Sacramento, California, with a branch office in Anchorage, Alaska. PLF has over 20,000 supporters throughout the United States and has the primary purpose of litigating in the public interest in the defense of individual freedoms, private property rights, and the free enterprise system.

#### COMMENTS OF PACIFIC LEGAL FOUNDATION ON THE PROPOSED REVISIONS TO THE 1989 FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS

PLF submits the following comments on the proposed revisions to the Federal Wetlands Delineation Manual pursuant to the notice in the August 14, 1991, Federal Register at 56 Fed. Reg. 40,446 (1991). PLF previously submitted comments on the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands on May 4, 1990. We are pleased to note that, in response to ours and many other comments across this nation, the Environmental Protection Agency, Corps of Engineers (Corps), Soil Conservation Service, and Fish and Wildlife Service (FWS) recognized a need for substantial modifications in the 1989 manual.

PLF fully supports efforts to establish a simple, uniform method of delineating wetlands for Clean Water Act (CWA) and Food Security Act jurisdictional purposes as well as for FWS inventorying purposes. It has long been recognized that with different delineation methods being utilized by a number of functionally related but independent agencies, the private property owner has had a difficult time understanding whether or

RONALD A. ZIMBRUN  
ROBIN L. RIVETT  
JAMES S. BURLING  
Pacific Legal Foundation  
2700 Gateway Oaks Drive,  
Suite 200  
Sacramento, California 95833  
Telephone: (916) 641-8888  
Attorneys for Pacific  
Legal Foundation

October 18, 1991

not any particular property contains wetlands. The goal to establish an understandable and uniform method for making the determination is thus appropriate. At the same time, the agencies must recognize that a delineation method may have a substantive impact upon a private property owner's ability to use land and accordingly must match as closely as possible with the statutory definitions of wetlands. Accordingly, to ensure that property owners' rights are provided appropriate review and consideration, the entire revised manual should be subjected to the formal notice and comment procedures of the Administrative Procedure Act (APA).

Pacific Legal Foundation commends the four agencies for their 1991 proposed manual. It will certainly help to accomplish the goals stated above and provide not only the property owner but also government staff with an appropriate process for delineating wetlands. We also applaud the agencies for tightening their evidence requirements for delineation of wetlands, because in so doing there will be much less uncertainty and discrepancy in future identification. By recognizing that the government has the evidentiary burden of establishing a wetland, all parties will benefit.

Aside from our support of the basic accomplishments of the proposed manual, there are some specific comments which are articulated in the following sections. These comments will address concerns and issues in the order they appear in the manual.

- 2 -

## COMMENTS

### Part I. Introduction

#### Purpose

Initially, we commend the manual for expressing explicitly that for the purpose of exercising any agency's statutory authority, the Federal government has the burden of proving that a particular site is a jurisdictional wetland and if an agency fails to meet its burden of proof, then the site may not be considered a wetland. This should be the guiding principle of this manual, to wit, the criteria established for identifying a wetland must be met and it is the duty of the regulatory government agency to meet the burden of providing the evidence necessary to satisfy all technical definitional criteria.

Without the evidence an area should not be defined as a wetland. The manual also identifies the various federal wetland definitions as found in the Clean Water Act, the Food Security Act of 1985, and used by the Fish and Wildlife Service for wetlands classification. It is important to emphasize, as has been pointed out in the manual, that even if an area generally can be defined under one of these definitions as a wetland and is also delineated as a wetland by using the mechanics described in this manual, a federal agency still may not have regulatory jurisdiction over that area. For example, Section 404 regulatory jurisdiction of wetlands is limited to areas that are waters of the United States which have a connection with interstate or foreign commerce. Accordingly, wetlands determinations at a

- 3 -

particular site which have been made through use of the manual still may not be subject to Section 404 jurisdiction. Thus, regulatory jurisdictions of a site identified under the manual as a wetland will be determined not just by the manual also in accordance with legal and policy considerations of the applicable regulatory program. We commend the manual for recognizing this limitation.

We also commend the participating agencies for allowing landowners to request a new delineation if their land has been delineated a wetland under the 1989 manual after publication of the proposed revisions. Of course, since the time of the publication of this statement, August 14, 1991, much has happened. The 1992 Energy and Water Development Appropriations Act makes it clear that for any uncompleted enforcement action or permit application, the landowner may request a delineation under the 1987 manual. Moreover, federal agencies are not to utilize the 1989 manual in any new delineations whatsoever. This is completely appropriate considering the overbreadth of the 1989 manual. PLF does take exception however with the statement in the proposed manual that "final actions such as permit issuances or completed enforcement actions already taken on wetlands delineated under the 1989 manual will not generally be reopened." Why not? The deficient 1989 manual did not provide for uniform application of wetland criteria and, in many instances, allowed for overinclusion of land as wetlands. It is simply unfair to reinstitute in the 1991 manual the government's evidentiary

burden of proving wetland existence and then to say the property owner cannot rely upon this new, appropriate standard. If landowners have reasonable cause to believe that their land has been misdefined and the 1987 manual or 1991 manual would correct this mistake, the property owner should have the right to a redelineation. In short, wetland determinations made before August 14, 1991, pursuant to the 1989 manual should be subject to redetermination even if a permit has already been issued or an enforcement action has already been initiated.

Part II. Mandatory Technical Criteria for Vegetated Wetlands Identification

The manual specifies that under natural undisturbed conditions vegetated wetlands generally possess three characteristics: (1) hydrophytic vegetation; (2) hydric soils; and (3) wetland hydrology. The manual goes on to state that the three technical criteria and their verifying characteristics are mandatory with certain exceptions. PLF strongly endorses the concept that delineating agencies must establish by clear and convincing evidence that each of these three technical criteria do in fact exist before a vegetated wetland can be identified. PLF believes that accurate wetlands determinations cannot be made unless all three wetlands components are in fact determined to exist under normal circumstances at each delineation site. As experience under the 1989 manual has shown, there is too much chance for inaccurate determinations if any of the three necessary wetland components is simply assumed or is "verified"

by secondary indicators or agency personnel using only their best professional judgment which is, of course, always subjective.

The manual also lists a number of categorical exceptions from the mandatory three component verification process. In so doing, the manual identifies "specific wetland types that may never meet all three criteria although they are widely recognized as wetlands." (Emphasis added.) The examples given of these specific wetland types are prairie potholes, plays lakes, vernal pools and pocosins, and other special wetlands that fall the hydrophytic vegetation criteria such as eastern hemlock swamps, tamarack bogs, and white pine bogs. FUF strongly objects to this facile methodology for jurisdictional wetland delineation of areas that do not satisfy the mandatory three criteria test. While some of these disturbed wetland areas may display the characteristics sought to be protected by the Clean Water Act others certainly do not. Vernal pools, for example, have absolutely no hydrological connection to the nation's water.

Similarly, these are substantial amounts of permafrost wetlands in Alaska which have no significant connection to navigable waterways. These areas should be excluded from the definition. In addition, the manual should give special consideration to recognizing the same exemption for Alaska wetlands such as the exemption contained in the Food Security Act of 1985. That act exempted Alaskan wetlands with a high potential for agricultural development and a predominance of

permafrost soils. Because Alaska has so much undisturbed wetland, over 99, and because some areas of Alaska universally meet at least one criterion (such as hydric soils in rain-drained Southeast Alaska) the manual should make it plain that all three criteria (hydrology, soils, and vegetation) must be unequivocally present before an area in Alaska is defined as a wetland. So-called cyclical wetlands such as Alaska's black spruce permafrost wetlands (which are often not particularly ecologically productive) should not be defined as wetlands if all three criteria are not fully met.

It must be remembered that the Clean Water Act is a comprehensive statute designed to prevent, reduce, or eliminate pollution of the navigable waters and groundwaters of the United States. 33 U.S.C. § 1252(e). Congress substantially rewrote the federal law governing water pollution in 1972 in order to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(e). Congress' objective was to achieve a level of water quality that provides for the "protection and propagation of fish, shell fish, and wildlife, and provides for recreation in and on water." 33 U.S.C. § 1251(a)(2). Thus, Congress sought through the permit requirement and evaluation process to prevent unnecessary discharges causing adverse impacts on water quality. When an area is classified as a wetland because "someone" finds that it is "widely recognized as wetlands," even though it has absolutely no hydrological connection to the nation's waters and does not

meet all three criteria mandated for determination of wetlands, the intent of the CWA is not being met. By attempting to extend jurisdiction beyond wetlands adjacent to waters of the United States to totally isolated wetlands like vernal pools, playa lakes, and prairie potholes, the Corps is no longer regulating to protect water quality of navigable waters as intended by Congress. Regulation of such quasi-wetlands which have not been demonstrated to possess the necessary hydrology, hydric soil, or hydrophytic vegetation does not help restore or maintain the chemical, physical, or biological integrity of the nations waters. Consequently, PLF believes that such rulemaking is statutorily incorrect as well as scientifically improper.

#### A. Wetland Hydrology Criticism

PLF strongly endorses the new standard for the determination of wetland hydrology. We support the requirement that before an area can be identified as a wetland it must be inundated for 15 or more consecutive days, or saturated from surface water or groundwater to the surface for 21 or more consecutive days during the growing season in most years. We believe such a test, as contrasted to the 1989 manual's test, allows for a much more realistic determination of whether or not a true wetland hydrology exists. We also endorse direct measurement as the standard methodology for determining whether or not

There has been no judicial resolution of whether extension of Section 404 jurisdiction to isolated wetlands is constitutionally authorized under the Commerce Clause of the United States Constitution. PLF believes that such extension is not authorized.

this wetland hydrology criterion is met. It is recognized that flexibility in applying tests to establish existence of wetland components is necessary as many field staff will not be able to do wetland determinations at the right time of the year or for a long enough period of time to directly observe whether or not inundation is occurring the appropriate length of time. Therefore, there need to be indicators other than direct measurement which may have to be used occasionally for establishing hydrology. However, PLF is concerned with the accuracy and veracity of delineations which rely too heavily upon secondary hydrologic indicators. For example, secondary indicators such as silt marks, drift lines, or surface scoured areas may be used, according to the manual, in conjunction with corroborative information to indicate wetlands hydrology. There is no time line provided however. If these indicators were created decades earlier, what validity do they possess as a current wetland hydrology indicator? We would suggest very little.

With regard to the corroborative information referenced above, the 1991 manual includes national wetlands inventory maps or aerial photographs neither of which will always provide a true indication of hydrology. National wetlands inventory maps constitute only an inventory tool for Fish and Wildlife Service. These maps identify areas as wetland even if they have only hydrophytic vegetation or hydric soils and have absolutely no hydrology. This inventory thus uses a wetland definition inappropriate for 404 jurisdiction purposes and thus national

identified as facultative wetland plants under the previous hydrologic criterion of 7 consecutive days of surface inundation or subsurface inundation within 18 inches of the surface which would not be identified as such under the new hydrological criterion? In other words, are there plants that should be recharacterized as facultative plants or facultative upland plants? Because there have been adjustments in the hydrology criterion, reexamination of the plant list is appropriate.

#### C. Hydric Soil Criterion

PLF supports the concept that hydric soils must be delineated on a site-by-site basis and cannot be delineated simply by reliance upon hydric soil maps prepared by the Soil Conservation Service (SCS). PLF is also concerned that reliance upon the national and state hydric soil list prepared by SCS in cooperation with the National Technical Committee for Hydric Soils (NTECHS) may create some veracity problems as well. This is because the hydrologic criteria used by NTECHS for determining hydric soils are inconsistent with the proposed hydrology requirements for wetlands and therefore create a risk that areas may be improperly identified as wetlands. We suggest that you investigate this potential for inconsistency and assure the public that there is compatibility between the proposed wetland hydrology standard and the hydrologic criteria for determining hydric soils used by NTECHS.

wetlands inventory maps should not be used. PLF recognizes that the manual requires this type of information to be of "sufficient" quality and extent that when taken together with secondary indicators, there is clear support for the presence of wetlands hydrology. However, such inexact standards allow for the exercise of subjective discretion which is contrary to a primary goal of the manual--to provide a consistent and uniform method for wetland identification. Thus, PLF believes it is inappropriate to rely on secondary indicators for the delineation of wetland hydrology. If as the manual says the driving force creating wetlands is wetlands hydrology, hydrology must be independently established to ensure a credible and accurate wetland delineation system.

#### B. Hydrophytic Vegetation Criterion

PLF has no preference between the prevalence index test or a facultative neutral approach to identification of hydrophytic vegetation. It would appear that both have their place and at times the facultative neutral test may provide for a much less burdensome but relatively accurate test. However, we do have some concern that the national list of wetland plant species being utilized for assessment may not accurately identify obligate wetland plants, facultative wetland plants, facultative plants, or facultative upland plants in view of the 1991 adjustment to the hydrology criterion factor. A facultative wetland plant, for example, usually occurs in wetlands meaning that its estimated probability is 67-99%. Are there plants that have been

three criteria must be identified before an area can be classified as a wetland. We do caution however that use of primary and especially secondary wetland indicators for the verification of any one of the wetland criteria must be strictly limited.

Moreover, reliance on subjective professional judgment of agency personnel with obvious vested interests in favor of verification defeats the purpose of this manual to establish an objective, uniform methodology for wetland identification.

PLF continues to be concerned that a number of geomorphological land forms which do not have the necessary three wetland indicator criteria are nevertheless being classified as wetlands. If an area does not have any hydrological connection to the nation's waters and its preservation does not assist in maintaining the chemical, physical, or biological integrity of the nation's waters it should not be identified as jurisdictional wetlands for the purpose of the Clean Water Act. It is essential to delineate each and every wetlands site individually without making any assumptions, predictions, or guesses as to on-site characteristics. It is only through this methodology that private property owners can be assured that their rights are being protected and, at the same time, actual wetlands are being delineated for appropriate protection.

DATED: October 16, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN  
ROBIN L. RIVETT  
JAMES S. BURLING

By   
ROBIN L. RIVETT

Attorneys for Pacific Legal  
Foundation

#### CONCLUSION

PLF thanks the Environmental Protection Agency, Corps of Engineers, Soil Conservation Service, and the Fish and Wildlife Service for the opportunity to comment on the Proposed Revisions to Federal Wetlands Delineation Manual. This is in stark contrast to the lack of opportunity given to comment on the original proposals for the 1989 manual. The national masthead which resulted was a clear indication of the substantive significance this manual has to a very large segment of the American public. With this interest in mind, PLF recommends that the entire manual be subjected to the formal notice and comment procedures of the APA. The application of this manual will determine whether many people may or may not productively use their property. Under these circumstances it is appropriate, if not necessary, that no changes in the manual appear without full opportunity for notice and comment. Accordingly, the manual should be adopted pursuant to the APA and included in total in the Code of Federal Regulations.

PLF commends EPA, Corp of Engineers, Soil Conservation Service, and Fish and Wildlife Service for their extraordinary efforts in attempting to correct the many deficiencies in the 1989 manual. This new manual goes a long way toward accomplishing this goal. It is especially heartening that this manual recognizes that wetlands must possess three identifying characteristics: hydrophytic vegetation, hydric soil, and wetland hydrology. PLF strongly endorses the position that these