



By Wendy Lathrop, LS

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Soggy Solutions, in New England and Elsewhere

In December 2003, the Association of State Wetland Managers (ASWM, www.aswm.org) organized a two-day program that addressed the gaps in state and federal regulations concerning wetlands and floodplains. The attendees included representatives of state and federal environmental agencies, environmental organizations, FEMA, the Army Corps of Engineers, state departments of transportation, and a few scattered other constituencies. I had learned about the program through the Association of State Flood Plain Managers (ASFPM, www.floods.org), since notice of various conferences is one of the membership perks. I may have been the only unassociated person there, representing only myself, a mere concerned citizen and design professional. But the kinds of interrelationships between the regulations and design criteria discussed should be a matter of concern to more than governmental agencies and special interest groups. The discussions pointed up not only gaps in regulations for wetlands and gaps in regulations for floodplains, but also gaps between regulations for wetlands *and* floodplains. A narrow compartmentalized view of controlling a soggy situation is not always the most effective, although it may be the quickest and therefore perceived as the most efficient.

A recent New Hampshire case pointed out just how similar and interrelated the functions of wetlands and floodplains truly are. Although these two land “conditions” are not identical, each contributes to not only the health of the biosphere (water quality, aquatic habitat), but also the “usefulness” of land to human interlopers. Not so long ago the federal government did all it could to encourage

the draining of wetlands to salvage what was otherwise considered wasted land; and technical guidance for development in floodplains, including elevation, flood-proofing, and levees, is still fingered as a reason our floodplains and floodways suffer construction encroachment. Only recently has a more holistic interaction between wetlands, floodplains, and human land use desires moved to the forefront of the way we attempt to redesign nature to meet those “needs”.

The Supreme Court of New Hampshire issued its opinion on *Cook v. Sullivan* in August of 2003 (829 A. 2d 1059). Both of these neighboring landowners owned rather soggy lands along the picturesque Lake

trying to correct the situation before suing. Standing water began accumulating in their yard so that they could not mow or use the yard for recreation. Water also accumulated in their garage, so that it could no longer be used for storage, and under their guest house, which created a strong musty odor making the building unusable during the months when the windows had to be closed. On complaining to the Sullivans that first year, the new neighbors removed some fill, moved a wall, and dug a drainage ditch, but this did not alleviate the problem.

The trial court found, and the Supreme Court confirmed, that Sullivan’s construction activities “consti-

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Winnepesaukee, but the Cooks were there first, purchasing their tract in 1946 and constructing a main house, garage, and guest house over the years. The Sullivans bought property next to the Cooks in 1996, with the idea of constructing a home on it. In the process of installing a three-bedroom modular home that they had trucked in, the Sullivans “used large quantities of fill in the area where they were building the house.”

By the following year, 1997, the Cooks found that their property was much wetter than it had ever been before, a condition they endured for four years while

tuted a nuisance, thereby causing damage to the plaintiffs’ property.” But more to the point for our consideration today is that the Sullivans never acquired a permit to fill the wetlands. They also never consulted with their neighbors before building on their newly purchased lot.

Amidst the arguments over whether or not the Sullivans’ home site was within jurisdictional wetlands and how much wetter the Cooks’ property was after the Sullivans’ property had been filled and built upon than it was before, the testimony of the experts underscores the delicate balance of water and soil, and how

quickly and easily this condition can become imbalanced to frustrate those who wish to use otherwise developable land. The Cooks' soil scientist stated that the Sullivans' construction "altered the elevation of the defendants' land as well as the flow of subsurface waters, causing increased wetness on the plaintiffs' property" and that "the only way to guarantee that we're not going to have any additional impacts on the Cook/Evans property, or to restore it to what it was previously, is to move that house and all that fill of the jurisdictional area..."

Although a drastic measure, the Supreme Court agreed with the trial court that the Cooks "should not be required to accept an alternate remedy, the efficacy of which is questionable, simply because full abatement seems harsh." Testimony convinced the court that moving the Sullivans' house and foundation forty or fifty feet, plus removal of the illegal fill, would restore the Cooks to their prior relatively dry enjoyment of their property.

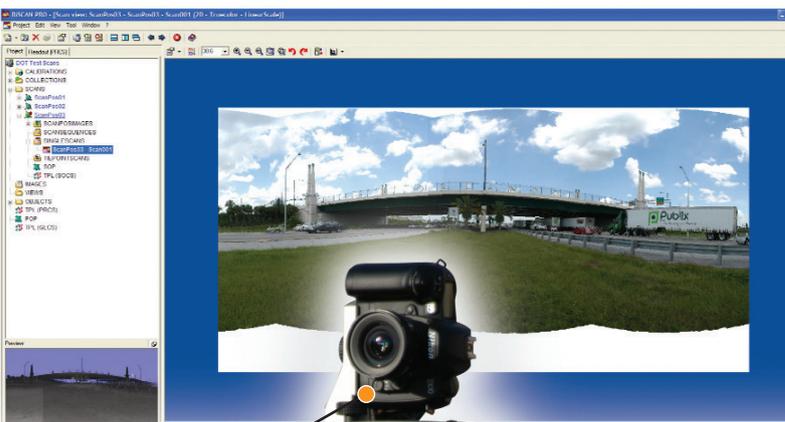
One aspect not mentioned in this case is whether or not there were identified floodplains in the area as well. FEMA's maps show that much of the area is identified as affected by the ubiquitous Zone A, a Special Flood Hazard Area without an identified base flood elevation. But filling anywhere in a watershed, whether directly in the floodplain or beyond its "legally defined" limits on the Flood Insurance Rate Maps, affects many other parts of the watershed. The water that can no longer seep into the ground, or can no longer remain below the surface, or is diverted from its normal course must go somewhere. Often "somewhere" is not where the neighbor wants it to be. In floodplain management, the cumulative effects of filling the floodplain and paving the watershed are finally gaining recognition as significant factors in planning and permitting processes. In wetlands as well, these cumulative effects have been slowly working their way into the public's consciousness for a number of years. *Cook v. Sullivan* illustrates a small-scale example of what happens when we self-centeredly consider only our own interests. As design professionals, we should look beyond our clients to other possible repercussions of development. Moving houses and removing fill are expensive propositions best avoided. *A*

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