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Wetlands- Where are We Now?

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Where Do Wetlands Regulations Come From? - Clean Water Act

- Primary CWA Goals:
 - Water Quality Standards (Fishable/Swimmable)
 - Eliminate Discharges of Pollutants
- National Pollutant Discharge Elimination System (“NPDES”) Permit Program
 - Authority: Clean Water Act (CWA)
 - 33 U.S.C. §1251 *et seq.*
 - Program Introduced in 1972



Clean Water Act

- Definitions (33 U.S.C. §CWA §502):
 - “Discharge of Pollutant” – “any addition of any pollutant to navigable waters from any point source...”
 - “Navigable waters” – “Waters of the United States, including territorial seas.”
 - “Pollutant” – “any dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”



Clean Water Act

- Definitions (CWA §502)(continued)
 - “Pollution” – “the man made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.”
 - “Point Source” – “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation...from which pollutants may or may not be discharged.”



Testing the Limits of the CWA

- How Does Wetlands fit into this Framework?
- 33 USC §1344 (§404):
 - The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.
- Traditionally called “Jurisdictional Wetlands” – those wetlands Corps of Engineers/EPA consider “Federal Wetlands”



Testing the Limits of the CWA

- Navigable Waters? 1986/1988
 - Waters that can or have been used in the past for interstate or foreign commerce
 - Interstate waters including interstate wetlands
 - Waters – the destruction of which may impact interstate commerce
 - Tributaries of waters above (can be intermittent)
Adjacent wetlands
 - Territorial sea
 - Not holding ponds, treatment ponds, lagoons used for purposes of the CWA



Testing the Limits of the CWA

- *Rapanos v. United States*, 547 US 715 (2006)
 - Plurality Decision (4-1-4) Typically apply the narrowest common grounds
 - *Scalia* – waters of the US should include only relatively permanent, standing or continuously flowing bodies of water
 - *Kennedy* – significant nexus to a traditional water



WOTUS

- 2015 Rule – Follows *Kennedy* opinion
 - Immediately appealed in several jurisdictions by industry groups and half of the states
 - Issue regarding jurisdiction
 - Stayed first by appellate court, then by several district Courts
 - Rule effective in 22 states; enjoined in 28 states
- 2017 Executive Order – Required EPA and USCOE to review rule – align with *Scalia* definition rather than “significant nexus”
- 2018 Proposed Rule – changed applicability date to February 2020 (appealed), comment ended on August 15, 2019
- Resulted in 2020 Navigable Waters Protection Rule



2020 Navigable Waters Protection Rule

- Covers 4 categories of “waters”
 - Territorial seas and waters susceptible to use in interstate or foreign commerce
 - Tributaries of these waters
 - Lakes and ponds
 - Adjacent wetlands
- Excludes categories such as groundwater, “ephemeral streams” and other “ephemeral features” such as artificial lakes, ponds, and most ditches



Navigable Waters Protection Act Criticized

The New York Times

*Trump Administration Rolls
Back Clean Water Protections*



Criticism of Navigable Waters Protection Act

- Reduced Jurisdiction particularly significant in arid states
 - Western States Most Impacted
 - Nearly every one of 1,500 streams found to be non-jurisdictional
- EPA and Corps indicated that 333 projects no longer required 404 permitting
- Environmental Groups dubbed this “The Dirty Water Rule”



Status of Navigable Waters Protection Rule

- January 20, 2021 – Biden lists NWPR on list of Rules EPA must review
- June 9, 2021 – EPA and Army Corps of Engineers Announce Intent to Revise WOTUS Rule
 - Will Restore rule to pre-2015 application (i.e. significant nexus)
 - Will Undertake new rule to further refine pre-2015 rule
- August 4, 2021 (86 FR 41911) EPA Announces August Public Shareholder Meetings/Opens up Public Comment until **September 3, 2021**
 - Docket ID No. EPA-HQ-OW-202100328 via Federal eRulemaking Portal <https://www.regulations.gov>



How Long Will Navigable Waters Protection Act Be Valid?

- August 31, 2021 – District Court for District of Arizona vacated Navigable Waters Protection Act
 - Six Native American Tribes sued the EPA and Army Corps of Engineers claiming rule failed to protect waterways
 - Judge justified ruling stating that it was inconsistent with the Clean Water Act and that leaving rule in place while current administration works on rulemaking could lead to “serious environmental harm.”



How Long will New Rule Take?

- 2015 Rule was promulgated after years of public meetings, was immediately appealed and was mired in litigation until Navigable Protections Water was passed
- Appeals of Vacatur of Navigable Waters Protection Act may last longer than new rule
- Agencies will likely take practical application and revert to pre-2015 “significant nexus”



State Regulations

- Prior to 2001 – no effective independent State Wetland Program
- Solid Waste Agency of Northern Cook County v. U.S. Army Corps of engineers (531 U.S. 159) struck down “Migratory Bird Rule”
- Indiana Developed Its Own Isolated Wetland Program



Indiana State Wetlands Program

- Indiana Defines “Waters of the State” and includes isolated wetlands
- Projects must show they’re completely avoiding impacts to state wetlands – but if unavailable must show project has minimized unavoidable impacts and provide compensatory mitigation



Indiana State Wetlands Program (pre-2021)

- State Isolated Wetlands Classified as 3 types
 - Type III – located in a setting undisturbed or minimally disturbed by human activity or development and that supports more than a minimal wildlife or aquatic habitat or hydrologic function
 - Type II – Not a Class I or Class III wetland or a Class I wetland that is rare or ecologically important (<0.25 acres exempt)
 - Type I – At least 50% of the wetlands has been disturbed and affected by human activity, only supports minimal wildlife or aquatic habitat or hydrological function (<0.5 acre)



Senate Enrolled Act 389

- Originally proposed to drastically cut state wetlands program
- As passed redefined Class II as “an isolated wetland that supports moderate habitat and ecological functions, including an isolated wetland that is dominated by native species...”
- Changes exemption of permitting requirement for class II from $\frac{1}{4}$ acre to $\frac{3}{8}$ acre
- Eliminates requirement to permit Class I (or low quality, high impacted) wetlands



Outcry over 389

- Northwest Indiana Times.com: April 29, 2021 “Gov. Eric Holcomb eliminated protections for nearly all state-regulated wetlands Thursday, despite the initial objection of two of his state agencies, every democrat in the General Assembly, and more than 90 Dates and local organizations.”
- WFYI.org, April 26, 2021: More than 100 Groups Ask Holcomb to Veto Wetlands Bill



Additional Changes by 389

- Includes clarification for Croplands and Field Tile Maintenance
 - Development of cropland does not require permit if:
 - Cropland has been used for agricultural purposes in prior five years or
 - Corps of Engineers has issued jurisdictional determination of no federal wetlands in prior ten years.
- Removes ephemeral stream permitting – defined as “surface water flowing or pooling only in direct response to rain or snowfall.”
- Maintenance of field tiles allowed in Class II if it does not have effect of draining wetland (and is necessary for adjacent land drainage)
- Maintenance of field tiles allowed in Class III if it does not drain wetland, necessary for adjacent land drainage, and applicant approves a site-specific approval



Indiana Wetlands Task Force

- Includes 14 members including most stakeholders – environmentalists, agency representatives, land surveyors and one representative of Farm Bureau
- Tasked with studying and making recommendations to balance land stewardship with development and mitigation of costs for such development



Practical Recommendations

- Wetlands are not an exact science – hire an advocate to carefully review your land
- Wetlands change with changing weather and stormwater flow patterns – update review regularly, don't presume old designations are adequate
- Be proactive in working with agencies prior to development – permitting is cheaper than enforcement





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