

Update on Regulatory Policies Related to Section 404 of the Clean Water Act

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Topics

- Impact of US Supreme Decisions on Waters of the United States as defined by the US Environmental Protection Agency (USEPA) and US Army Corps of Engineers (Corps)
- Changes in Corps wetland delineation methods
- Silviculture on wetland sites – current issues

Reference Sources for Wetlands Regulations

- Corps regulations:
 - Wilmington District, Corps
<http://www.saw.usace.army.mil/wetlands/index.html>
- State regulations: 15A NCAC 02B
http://h2o.ehnr.state.nc.us/admin/rules/codes_statutes.htm
- Overview of both Corps and State Regulations: NC Forestry Best Management Practices Manual for Water Quality, Chapter 6 and Appendix 1

Applicability of Section 404 of the Clean Water Act

- The federal authority to apply the Clean Water Act comes from the interstate commerce clause of the US Constitution.
- First sentence of Section 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.” Has not changed since the initial passage in 1972 of the Water Pollution Control Act, later dubbed the Clean Water Act.
- But, the entire Clean Water Act currently applies to Waters of the United States as defined in USEPA and Corps regulations; such waters must have a relationship to interstate commerce.
- CWA Section 502, Definitions: (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

So What Are “Waters of the United States”

- Waters of the US are defined in USEPA and Corps regulations and include: the territorial seas, sounds, navigable rivers and streams, perennial water bodies, tributaries of all waters above, wetlands adjacent to all waters above, and special aquatic sites.
- Those regulations have frequently been “interpreted” by guidance documents that are not regulations but have the same clout as regulations so long as they are not challenged in the legal system.

Expansion of Types and Total Area of Jurisdictional Aquatic Features

- That expansion was accomplished via revisions in the regulations that (1) were initiated by EPA and the Corps or (2) were a response to federal court decisions.
- That expansion occurred during 1972-1986
 - Minimum in 1972; navigable waters only.
 - Maximum in 1986, practically all aquatic features, including most wetlands not adjacent to other waters, i.e. isolated wetlands.
 - Isolated wetlands were claimed via the “migratory bird rule”; not a rule at all but simply a “clarification” that was described in the preamble to broadly revised EPA and Corps regulations issued in 1986. Use of a wetland by migratory birds was considered to be a sufficient relationship to interstate commerce.

Contraction of Types and Total Area of Jurisdictional Aquatic Features

- That contraction was accomplished via two recent US Supreme Court Decisions on wetlands cases appealed through the federal court system. Both cases were appeals of jurisdictional decisions by the Corps that related to connectivity to a navigable water.
- January 2001 – Solid Waste Agency of Northern Cook County (SWANCC) vs the US
- June 2006 – Rapanos and Carabell vs the US

The SWANCC Decision

- Corps had claimed jurisdiction over a water-filled former quarry that SWANCC had purchased to develop a new solid waste landfill.
- The quarry was completely isolated from all other waters but a bird survey by the Illinois Audubon Society recorded the presence of several species of migratory birds.
- SWANCC appealed the jurisdictional determination to the federal courts claiming that the migratory bird rule was an improper expansion of the reach of the CWA.
- The Supreme Court agreed with SWANCC and ordered the EPA and Corps to claim isolated wetlands only when there was a clear relationship to interstate commerce.

Impact of the SWANCC Decision

- Estimates by state of total area of isolated wetlands ranged from about 20 % (NC) to 70 % (glaciated states of the upper Midwest)
- Many states quickly implemented state regulations to protect isolated wetlands and implement dredge and fill permitting programs. Those states include NC, VA, and TN. SC has yet to implement such a regulation.
- NC has three related regulations – state took over the regulatory functions of the Corps for isolated wetlands
 - 15A NCAC 02B .0231 Wetland Standards – protects functions of wetlands
 - 15A NCAC 02B .0230 Activities Deemed to Comply With Wetland Standards – applies the silviculture exemption as described in the Corps regulations to isolated wetlands in NC
 - 15A NCAC 02H .1300 Discharges to Isolated Wetlands and Isolated Waters – permit program for isolated waters

The Rapanos-Carabell Decision

- Similar cases from Michigan that were combined because both focused on related jurisdictional issues.
- Rapanos Case – wetland was adjacent to a small drainage ditch that connected through a series of ditches and streams eventually to a navigable stream.
- Carabell – wetland was separated from a drainage ditch by an impermeable berm, then similar connection to a navigable stream via ditches and streams.
- Key issues considered were (1) adjacency of wetlands to channels and (2) the type of feature that constitutes a jurisdictional stream.

Rapanos-Carabell Was a Plurality Decision and Three Different Opinions Were Entered

- Justices Roberts, Scalia, Alito, and Thomas favored a great reduction in extent of jurisdiction
- Justices Stevens, Souter, Ginsberg, and Breyer favored the status quo, i.e. allowing EPA and Corps complete latitude to make jurisdictional determinations
- Justice Kennedy's decision became the governing policy of the opinion. He concluded that the Sixth Circuit correctly recognized that a water or wetland constitutes "navigable waters" under the Act if it possesses a "significant nexus" to waters that are navigable in fact or that could reasonably be so made.

So, What is Significant Nexus?

- Took EPA and the Corps a year to draft guidance for making jurisdictional determinations applying the significant nexus assessment. That guidance is currently in the test/review process.
- Significant nexus for a water feature means a continuous connection of features with significant aquatic functions from the water in question to a “traditional navigable stream”

Impact of the Rapanos-Carabell Decision

- Creates a class of waters (streams, wetlands, and ponds) that otherwise meet the Waters of the US definition but are not isolated and do not have a significant nexus to a traditional navigable water.
- Creates huge additional workload for the Corps and environmental consultants to make significant nexus assessments for each site.
- Currently, such non-jurisdictional waters in NC have no federal or state regulations that provide for land uses that may degrade wetland functions. They meet the state definitions of waters of the state or wetlands and are protected from functional degradation by state water quality and wetland standards.
- NC Division of Water Quality has developed proposed revisions to the state wetlands regulations to include the non-jurisdictional wetlands in the isolated wetlands rules. When those rules are approved by the Environmental Management Commission, then the silvicultural exemption will once again apply to all wetlands in the state.

Impact of the Supreme Court Decisions on Silvicultural Operations

- SWANCC Decision – no impact on silvicultural operations. Silvicultural operations on isolated wetlands are exempt from state permits so long as the restrictions of the silvicultural exemption are followed.
- Rapanos-Carabell Decision – any land management activity on non-jurisdictional wetlands that degrades the functions of the wetland are prohibited. Temporary state rule to include non-jurisdictional waters with isolated waters will be approved by the NC Environmental Management Commission soon.

NC Wetland Standards

- b) The following standards shall be used to assure the maintenance or enhancement of the existing uses of wetlands identified in Paragraph (a) of this Rule:
- (1) Liquids, fill or other solids or dissolved gases may not be present in amounts which may cause adverse impacts on existing wetland uses;
 - (2) Floating or submerged debris, oil, deleterious substances, or other material may not be present in amounts which may cause adverse impacts on existing wetland uses;
 - (3) Materials producing color, odor, taste or unsightliness may not be present in amounts which may cause adverse impacts on existing wetland uses;
 - (4) Concentrations or combinations of substances which are toxic or harmful to human, animal or plant life may not be present in amounts which individually or cumulatively may cause adverse impacts on existing wetland uses;
 - (5) Hydrological conditions necessary to support the biological and physical characteristics naturally present in wetlands shall be protected to prevent adverse impacts on:
 - (A) Water currents, erosion or sedimentation patterns;
 - (B) Natural water temperature variations;
 - (C) The chemical, nutrient and dissolved oxygen regime of the wetland;
 - (D) The movement of aquatic fauna;
 - (E) The pH of the wetland; and
 - (F) Water levels or elevations.
 - (6) The populations of wetland flora and fauna shall be maintained to protect biological integrity as defined at 15A NCAC 2B .0202

Changes in Wetland Delineation Methods

- Series of regional manuals are being developed that will be supplements to and will replace much material in the 1987 Corps of Engineers Wetland Delineation Manual

http://www.usace.army.mil/cw/cecwo/reg/reg_supp.htm

Major Changes

- More emphasis on field indicators versus collecting data to test the delineation criteria
- More choices for hydrophytic vegetation assessment
- Many more hydrology indicators
- More options for making hydrology assessments on problem and altered sites and during droughts
- Hydrology criterion spelled out in the manual for the first time: water table within 12 inches of the surface for two weeks in the growing season in 5 or more years out of 10
- Hydric soil indicators in the manual are replaced by: Indicators of Hydric Soils in the United States.

Current Issues in Silviculture on Wetland Sites

- Minor drainage
 - Never has been clearly defined
 - Interpretations are inconsistent among Corps personnel and particularly among Corps Districts
 - Common restrictions frequently mentioned by Corps personnel are unwritten, unofficial policy; do not have the force of regulations
 - Over the last decade, the Corps has increasingly narrowed and restricted the concept of an exemption for silvicultural minor drainage

■ Ditch maintenance

- New Regulatory Guidance Letter is open for review through Feb 11. Provides for ditch maintenance, but as currently drafted, this RGL seems to delete the exemption for silvicultural minor drainage

<http://www.usace.army.mil/cw/cecwo/reg/rgls/rgl07-02.pdf>

- Clean ditches exactly along original centerline
- Clean ditches only to original cross-section; may slope sides to minimize slumping and erosion
- May repair linings, culverts, control structures, etc.
- Keep forever all maps, photos, written information etc. that documents when ditches were constructed. Ditches constructed prior to July 1976 were permitted by a Nationwide Permit

- Forest Road Construction in wetlands
 - BMPs in Corps regulations
 - Wilmington District, Corps road construction guidelines
 - Reference: NC Forestry Best Management Practices Manual for Water Quality, Chapter 6 and Appendix 1