

Understanding Wetlands Laws and Regulations

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Even though Utah is the second-driest state in the nation, wetlands issues frequently arise in many different situations, including land development, mining and mineral extraction, agriculture, and stream alteration. This article provides a general overview and introduction to wetlands laws and regulations.

The Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), was enacted in 1972 “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” i.e. to make the nation’s waters fishable and swimmable.¹ The CWA seeks to do this by preventing future contamination and pollution of waters. The central feature of the CWA is section 301, which prohibits the discharge of any pollutant into a navigable water unless otherwise authorized by a permit.² It should come as no surprise that pollutants include almost anything other than pure water, such as solid waste, sewage, garbage, chemical wastes, biological materials, radioactive materials, industrial, municipal, and agricultural waste, wrecked or discarded equipment, rock, sand, and even heat.³

While the CWA generally prohibits discharges of pollutants, it authorizes the issuance of permits for certain discharges under certain conditions. The two most common permits are authorized under section 402 and section 404 of the CWA. Section 402 permits are issued under the National Pollutant Discharge Elimination System (NPDES) system administered by the EPA or a delegated state agency. In Utah, the Division of Water Quality has been granted authority to issue section 402 permits under the Utah Pollutant Discharge Elimination System (UPDES). UPDES permits include permits for discharges associated with municipal stormwater systems, construction activities, and industrial activities, among other discharges.

The other common permits are section 404 wetlands permits, which are issued by the Army Corps of Engineers (Corps) for certain discharges of “dredged or fill material” into “navigable waters,” including wetlands.⁴ Because wetlands issues can surface in many different situations, each situation should be evaluated to determine whether a section 404 wetlands permit is required.

In determining whether a wetlands permit is required, two questions must be answered: (1) Is the area that will be impacted by a proposed activity within the Corps’ geographic jurisdiction under the CWA? (2) Is the proposed activity within the Corps’ regulatory jurisdiction under the CWA? If both the area and the activity are within CWA jurisdiction, a section 404 wetlands permit will be required.

First, “navigable waters” is defined by statute as the “waters of the United States,”⁵ which in turn is presently defined by the Corps’ regulations to include, navigable waters; tributaries to navigable waters; interstate wetlands; wetlands that could affect interstate or foreign commerce; and wetlands “adjacent” to any of the above (i.e. adjacent to other waters of the United States).⁶

¹ 33 U.S.C. § 1251(a)

² 33 U.S.C. § 1311(a)

³ 33 U.S.C. § 1362(6)

⁴ 33 U.S.C. § 1344(a)

⁵ 33 U.S.C. § 1362(7)

⁶ 33 C.F.R. 328.3(a)

However, “waters of the United States” does not include isolated wetlands.⁷ Whether wetlands are considered to be adjacent to other waters of the United States or are isolated wetlands is currently an area of great uncertainty. “The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands’.”⁸

However, in *Rapanos v. United States & Carabell v. U.S. Army Corps of Engineers*, 547 U.S. 715 (2006), the Supreme Court muddied the waters regarding the extent of the Corps’ jurisdiction over wetlands not immediately adjacent to traditionally navigable waters. In a divided opinion, the Court established two different standards for determining jurisdiction, neither of which has gained traction as the official test. Under Justice Scalia’s opinion, the Corps has jurisdiction if the wetland is adjacent to “a relatively permanent body of water connected to traditional interstate navigable waters” and “has a continuous surface connection with that water.” Intermittent, ephemeral, or periodic channels are not relatively permanent bodies of water.

Under Justice Kennedy’s concurrence, on the other hand, adjacent wetlands are jurisdictional if “in combination with similarly situated lands in the region, [they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” Thus, Kennedy’s test does not require a relatively permanent water or a surface connection.

The federal courts are divided as to which test to apply. Post-*Rapanos* cases continue to interpret *Rapanos* and define the boundaries of Corps jurisdiction, with no consensus emerging yet. The Corps, however, has issued guidance indicating that it will assert jurisdiction if either of the tests is satisfied. Further guidance regarding jurisdiction and the *Rapanos* decision is available on the Corps’ website.⁹

Also critical to the question of jurisdiction is whether the area in question is actually a wetland. The Corps’ and EPA’s regulations define “wetlands” as “those areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil condition. Wetlands generally include swamps, marshes, bogs, and similar areas.”¹⁰ In short, wetlands are typically determined based on the presence of 3 parameters: soils, hydrology, and vegetation. The physical boundaries of a wetland are determined by a “delineation.” The Corps and EPA each have delineation manuals outlining specific criteria and methodology to determine the physical boundaries (delineation) of the wetland. The Corps’ 1987 manual has become the standard presently used by most federal and state agencies. There is no distinction for man-made waters such as ponds, drainage ditches, canals, etc. As long as the wetlands indicators occur under “normal circumstances,” the waters may be wetlands.

If the area to be impacted by a certain activity is within the Corps’ section 404 jurisdiction, then it must be determined if the proposed activity is a regulated activity within

⁷ See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

⁸ 33 C.F.R. 328.3(c)

⁹ http://www.usace.army.mil/CECW/Pages/cwa_guide.aspx

http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/cwa_juris_2dec08.pdf

http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/jd_guidebook_051207final.pdf

¹⁰ 33 C.F.R. § 328.3(b); 40 C.F.R. § 230.3(t)

section 404 jurisdiction. Section 404 prohibits the “discharge of dredged or fill material into the navigable waters” except upon issuance of a permit.

“Fill material” is defined by Corps regulations as “material placed in waters of the United States where the material has the effect of . . . [r]eplacing any portion of a water of the United States with dry land; or [c]hanging the bottom elevation of any portion of a water of the United States.”¹¹ Generally, “fill material” refers to material from outside the waterbody or wetland in question, and includes rock, sand, soil, clay, plastics, construction debris, wood chips, and mining overburden. “Fill material” excludes trash and garbage, because they are covered by section 402 NPDES permit provisions.

“Discharge of fill material” means the “addition of fill material into waters of the United States.”¹² Examples of “discharge of fill material” include placement of fill for construction of structures; any structure requiring rock, sand, or dirt; dams and dikes; levees; and pilings.

“Dredged material,” on the other hand, is defined by Corps regulations as “material that is excavated or dredged from water of the United States”¹³ In other words, “dredged material” generally refers to material that comes from the waterbody or wetland in question. “Discharge of dredged material” means “any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, waters of the United States.”¹⁴ It does not include incidental additions and incidental fallback of dredged material, such as when a scoop shovel lifts dredge out of the water, and some of it falls back in.

Certain activities that otherwise constitute a “discharge of dredged or fill material” are exempted from regulation, such as discharges of dredged and fill material resulting from normal farming, silvicultural, and ranching activities; maintenance of dams and bridges; construction of certain irrigation or sedimentation systems; construction of forest and farm roads; and some state-approved projects.¹⁵ Routine discharges are exempt, but one-time discharges resulting in permanent alterations are not exempt, such as filling swamp land to convert it cultivated land.

If both the area and the activity are within the Corps’ section 404 regulatory jurisdiction, any activity that impacts the wetland must obtain a permit from the Corps. General permits are required for regulated discharges with minimal adverse effects, while individual permits are required for potentially significant impacts to wetlands.

General permits are issued on a nationwide, regional, or statewide basis, generally last up to 5 years, and are revocable by the Corps if negative effects results or more appropriately regulated by individual permits. Nationwide Permits (NWP) are general permits that are designed to “regulate with little, if any, delay or paperwork certain activities having minimal impact.”¹⁶ They set forth the conditions for compliance, which in some case requires a wetlands delineation. Examples of issued NWPs include cranberry production, hydropower production, cleanup of hazardous and toxic waste, survey activities, oil spill cleanup, single-family residential construction, and boat ramps. Some NWPs require a Pre-Discharge Notification (PDN), after which the Corps has 30 days to notify the applicant if activity does not quality for

¹¹ 33 C.F.R. 323.2(e)

¹² 33 C.F.R. 323.2(f)

¹³ 33 C.F.R. 323.2(c)

¹⁴ 33 C.F.R. 323.2(d)

¹⁵ 33 U.S.C. § 1344(f)

¹⁶ 33 C.F.R. 330.1(b)

NWP. For some activities, if all NWP conditions are satisfied, some permittees may proceed without notifying the Corps.

The individual permit process is more involved, requiring an application, public notice (and sometimes public hearing) of the proposed project, compliance with other statutes (NEPA, ESA, CZMA, NHPA), and record of decision/statement of findings and permit. The Corps makes the permit determination based on certain criteria established in the 404(b)(1) Guidelines, which are administrative regulations promulgated by EPA.¹⁷ If the proposed activity does not comply with the guidelines, the permit will be denied. The 404(b)(1) Guidelines require denial of a permit if (1) there is a practicable alternative to the proposed discharge; (2) discharge will cause or contribute to significant degradation of waters of the United States; (3) no practicable mitigation steps are taken; or (4) the project violates other water quality statutes or other statutes, such as the Endangered Species Act.

Even if the proposed activity complies with the Guidelines, a permit may be denied if it “would be contrary to the public interest.” A Public Interest Review evaluates the probable impact of the proposed activity and its intended use on the “public interest,” such as conservation, economics, aesthetics, general environmental concerns, historic value, fish and wildlife, flood damage prevention, water supply and conservation, water quality, energy, etc.¹⁸

The Corps and EPA have a goal of “no net loss” of wetlands. This goal is achieved by a hierarchy of policies. First is avoidance. The 404(b)(1) Guidelines require no practicable alternative before a permit will issue. This requires avoiding adverse impacts when practicable. Second, if impacts are unavoidable, the permittee must minimize the impacts such as by altering the discharge location, the discharge material, controlling material after discharge, methods of dispersion, technology, timing of discharges, etc.¹⁹ Third, if impacts to the wetlands remain after avoidance and minimization, the permittee must provide compensatory mitigation.²⁰ Compensatory mitigation primarily involves restoration, enhancement, creation, and preservation of other wetlands.

Recent developments in wetlands regulations involve the use of mitigation banking and in-lieu-fee mitigation as alternatives to traditional compensatory mitigation. Mitigation banking involves a bank “sponsor” who implements mitigation activities in a particular wetland location to offset wetlands impacts elsewhere, and sells mitigation credits to others. The sponsor can be a public or private entity. In-lieu-fee mitigation involves payment by the permittee of an in-lieu fee by providing funds to a third party that is implementing a mitigation project. The 2008 Wetlands Compensatory Mitigation Rule creates a flexible preference for the use of mitigation bank credits to satisfy requirements for wetlands compensatory mitigation; in-lieu fees are preferred second, and permittee mitigation is last.

Projects with the potential to impact wetlands should look at whether impact to the wetlands can be avoided altogether. If not, plans for obtaining wetlands permits and implementing compensatory mitigation should be commenced as early as possible to prevent unnecessary delays. With proper planning many difficulties in dealing with wetlands issues can be prevented.

¹⁷ 40 C.F.R. 230.10(a)-(d)

¹⁸ 33 C.F.R. 320.4(a)

¹⁹ 40 C.F.R. 230.70

²⁰ 40 C.F.R. 230