

Developments in Water Regulations Wetlands Update

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Waters of the U.S. – Where are We Now?

Presented by: Amy E. Romig

Indiana Chamber of Commerce
2019 Environmental Conference
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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



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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.”



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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.”



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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.



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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



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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 because, according to him, that was the definition of and wetlands physically abutting such waters Extremely Hazardous Substances
 - *Kennedy* – significant nexus to a traditional water



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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
- 2018 Rule – changed applicability date to February 2020 (appealed)
- 2018 Proposed rule – public comment ended on August 15, 2019



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Latest Rule – September

The New York Times

***Trump Administration Rolls
Back Clean Water Protections***



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Latest Rule September



Drew Angerer/Getty Images

ENERGY & ENVIRONMENT

Trump administration rolls back landmark water protections



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Repeal of 2015 Rule

- EPA and Corps finalized repeal rule.
 - Signed by Administrator Wheeler on September 12, 2019
 - Signed by Assistant Secretary of the Army for Civil Works James on September 5, 2019
 - Directs agencies to implement the pre-2015 Regulations and guidance documents
- Environmental Groups Indicate they'll sue



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What About Groundwater?

- This isn't New:
 - *Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169 (D. Idaho, 2001)
 - Court found that groundwater which was hydrologically connected to surface waters could be waters of the United States.



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Circuits Split

- Hydrological connection between Groundwater and Surface Water Confers Jurisdiction:
 - *Hawai'i Wildlife Fund v. Cnty. of Maui*, 881 F.3d 754 (9th Cir. 2018)
 - *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018)
- Rejects Hydrological Connection Theory
 - *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, No. 18-5115 (6th Cir. Sept. 24, 2018)
 - *Tennessee Clean Water Network v. TVA*, No. 17-6155 (6th Cir. Sept. 24, 2018) Application of petroleum necessary for construction*



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Supreme Court Litigation

- Supreme Court has accepted *County of Maui, Hawaii v. Hawaii Wildlife Fund*
- Touted as “The Clean Water Case of the Century”
- Dozes of Amicus Curiae Briefs
 - Former EPA Heads
 - 13 States
 - Native American Tribes
 - US Chamber of Commerce
- Oral Argument Set for November 6, 2019
- Is the case Moot?
 - Maui County Council voted to settle case on September 21, 2019



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Wetlands Update and Developments in Water Regulations

Ben Harvey (Cardno)

9 October 2019 – Indiana Environmental Conference

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Regulations

- > Background on Regulatory Programs/Jurisdiction
- > Overview of Indiana Permitting
- > Compensatory Mitigation



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Regulatory Programs/Jurisdiction

> Clean Water Act Section 404

- **Section 404** - establishes a program to regulate the discharge of dredged and fill material into Navigable Waters (waters of the United States)
- Wetlands and Tributaries added later

> Clean Water Act Section 401

- (1) Any applicant for a Federal license or permit ... shall provide the licensing or permitting agency a certification from the State in which the discharge originates... that any such discharge will comply with (applicable water pollution control regulations)

> Indiana Code (IC 13-18-22) and IAC (327 IAC 17)

- Regulates wetland activities outside CWA Jurisdiction

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Regulatory Programs/Jurisdiction

> Jurisdictional Stream

- Traditionally Navigable Waterways (TNW)
- Tributaries to TNW
- Tributaries to tributaries to....
- Regulatory:
- “Ordinary High Water Mark”
- “Defined Bed and Bank”



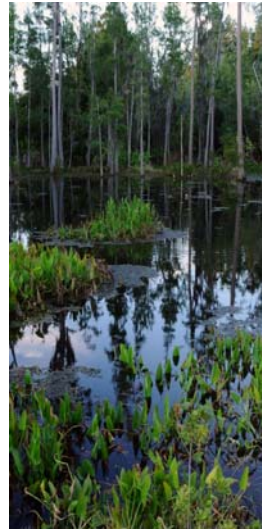
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Regulatory Programs/Jurisdiction

- > Jurisdictional Wetlands
 - Defined in USACE / EPA Regulatory Guidance
- > State Isolated Wetlands
 - The Same Identification Methodology
 - Anything Not Regulated Under CWA



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Overview of Indiana Permitting



- > Impacts to Streams and Wetlands Require Permitting Under Section 404 of the CWA

- 401 WQC Program (IDE)
- 404 Program - USACE
- 404 Permit may be issued following WQC certification

- > ...or Under the Indiana State Regulated Wetlands Rules



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Overview of Indiana Permitting

> Major Permit Thresholds – USACE

- 1 acre of “waters” impacts (wetland + streams)
- 1,500 linear feet of stream impacts

> Major Permit Thresholds - IDEM

- 0.1 Acre of Wetland Impacts
- 300 Linear Feet of Stream Impact
 - 150 Linear feet of Stream Bed “Changes”

> Mitigation Thresholds

- Generally same as IDEM Thresholds

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Compensatory Mitigation

> Replacement for Streams and Wetlands Impacted by a Project

- Generally Replace More Than Impacted
 - 1:1 Ratio up to 4:1 Ratio+

> USACE Hierarchy:

- Banks > In-Lieu Fee > Permittee Responsible

> No Formal IDEM Hierarchy

- But Different Mitigation Ratios for On-Site vs. Off-Site



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Compensatory Mitigation – Recent Update

> Indiana In-Lieu Fee Mitigation Program

> IDNR Administers Program (with partner agencies' oversight)

> Fee-Based System – Stream / Wetland Mitigation

- Generally Affordable for Wetlands
- Generally Easier to Implement
- Time Saving



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Thank you

For more information

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