

Wetlands Permitting & Planning

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What Determines a Wetland?

- Plants – Hydrophytic Vegetation
 - Upland - Facultative - Obligate
- Hydrology – Water
 - Water Table
 - Surface water - Groundwater
- Soils – Hydric
 - Anaerobic Conditions



Wetlands Present?



Wetlands Present?

Permitting

- Agencies: U.S. Army Corps of Engineers (USACE) and Environmental Protection Agency (EPA)
 - Secondary Agencies:
 - U.S. Fish and Wildlife Service (USFWS)
 - Bureau of Land Management (BLM)
 - U.S. Forest Service (USFS)
 - State Historic Preservation Office (SHPO), Tribes, and State/Local Entities
- Regulatory: *Clean Water Act (CWA)*
 - Section 401: *State Certification of Water Quality*
 - Section 402: *National Pollutant Discharge Elimination System*
 - Section 404: *Permitting Discharges of Dredge or Fill Material*
 - Nationwide Permits (NWP)
 - Individual (Standard) Permits (IP)



US Army Corps
of Engineers®



NWP vs IP

Nationwide Permits

- USACE Non-notifying
 - < 0.1 acre of impacts
 - General and Regional Conditions are met
- USACE Notifying
 - Typically > 0.1 acre and < 0.5 acre of impacts
 - Pre-construction Notifications (PCN): typically a 30 to 45-day USACE review period

Individual (Standard) Permits

- > 0.5 acre of impacts
 - Requires public notification, compensatory mitigation plan, and alternatives analysis
 - Typically 6 months and greater USACE review period

Permanent vs Temporary Impacts

Permanent Impacts

- Impacts NOT restored to pre-construction contours within 12 months
- Compensatory mitigation required for > 0.1 acre loss of wetlands
- Types
 - Access roads
 - Well pads
 - Discharges that permanently affect the aquatic site

Temporary Impacts

- Impacts restored to pre-construction contours within 12 months (unless authorized by USACE)
- Easier to reclaim
- Types
 - Pipelines
 - Plug and abandons
 - Discharges that are cleared or cleaned up

2015 – Clean Water Rule Regulations

Jurisdictional Wetlands

- Protected under Section 404 permitting

Isolated Wetlands

- Wetlands with no connection to other WOTUS
- Distance-based limitations associated with determining and defining “significant nexus” for isolated wetlands
 - Depending on distance from a WOTUS, protected under Section 404 permitting



Permitting Changes

EPA and USACE finalized a Rule to repeal the 2015 - Clean Water Rule Waters of the United States (WOTUS) definition

- Took affect December 23, 2019
- Restored the regulations that existed prior to the 2015 Rule
- Repealing it for four primary reasons



Four Primary Reasons

- Overreaching legal limits on the agency's authority under the Clean Water Act
- Failed to let the states rule in on the matter
- Failed to get a clear statement from congress to allow federal rule over state's authorities
- The distance-based limitations lacked adequate record support

Current and pre-2015 Regulations

Jurisdictional Wetlands

- Protected under Section 404 permitting

Isolated Wetlands

- Wetlands with no connection to other WOTUS
- Does not have distances to help define if isolated or not– ultimately needs a “significant nexus” to be considered adjoined
 - Wetlands that are “bordering, contiguous, or neighboring”
 - Case by case basis for USACE to determine if protected by Section 404 permitting

What Do The Changes Mean?

Jurisdictional Wetlands

- No change

Isolated wetlands

- Lost certain protections
- Easier to make the case that they are isolated
 - Requires no Section 404 permitting
- Requires USACE determination to verify if isolated and non-jurisdictional

Case Study : USACE Notify

- Proposed pipeline on private property
- Proposed 50-foot disturbance right-of-way
- Impacts are temporary
- Wetlands delineated and 0.12 acre of disturbance is anticipated
- USACE notification required
 - Disturbance > 0.1 acre
 - PCN required



Case Study : USACE Non-notify

- Proposed pipeline on private property
- Proposed 50-foot disturbance right-of-way
- Impacts are temporary
- Wetlands delineated and 0.07 acre of disturbance is anticipated
- USACE notification NOT required
 - Disturbance < 0.1 acre
 - No discharges to occur to the wetland
 - General and Regional Conditions met



Project Planning

- Factors to Consider
 - Construction Schedule and Project Timing
 - Budget/Cost
 - Construction Limitations
- Recommendations
 - Plan Ahead
 - Avoid
 - Boring
 - Re-routing
 - Limit Disturbances
 - Proper Best Management Practices (BMPs)
 - Temporary Impacts vs. Permanent Impacts





Thank You!

Any Questions?

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