

# Wetlands Permitting & Planning

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# What Determines a Wetland?

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



# Wetlands Present?

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# Wetlands Present?

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# 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

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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

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- 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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