Unit 20 Regulation of Wetlands

Section 404 of the Clean Water Act, Section 10, Rivers and Harbors Acts of 1890 and 1899
Types of regulatory oversight

- Letters of permission
- General permit
- Individual permit
General permits

- Allow activities w/o individual application
- Notice may be required (PCN)
- Section 401 certification may still be required
- Mitigation may be required
Nationwide Permit Program

Nationwide Permits

- Specific conditions
- General conditions
  - Regional & case by case conditions
- Section 404 only conditions
Nationwide Permits

1. Aids to navigation
2. Structures in artificial canals
3. Maintenance
4. Fish and Wildlife harvesting, enhancement, and attraction devices and activities
5. Scientific measurement devices
Nationwide Permits

- NWP 26 transition
  - Expired June 7, 2000
  - 5 new permits & modification of 6 existing permits
    - 1/2 acre limitation
    - PCN
Individual Permits

- Individual application
- 2-3 month processing time
  - EIS required - 3 years, average
- Public comment may be required
- Emergency exceptions
Individual Permits

• Procedure
  • Wetland delineation
  • Preapplication evaluation
  • Public notice
  • Comment period
  • Public hearings
  • Permit evaluation
  • Statement of findings
Individual Permits

Procedure (cont.)

- EPA evaluation
- Section 401 certification
In these regulations, the agency asserted jurisdiction over

1. Interstate wetlands;
2. Wetlands adjacent to waters used in interstate commerce and recreation, i.e., the "adjacent wetlands" rule; and
3. Intrastate wetlands, mudflats, sandflats, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds where degradation would affect interstate commerce, i.e., the "other waters" rule. 33 C.F.R. Sec. 328.3
In 1986, the Corps provided further clarification not by amending 33 C.F.R. Sec. 328.3 but by issuing a Guidance Document. In it, the agency asserted jurisdiction over wetlands that are or may be used as habitat by migratory birds that cross state lines, i.e., the "migratory bird" rule. See 51 Fed. Reg. 41217 (1986).
Cases

- **U.S. v. Wilson, 133 F.3d 251 (4th Cir. 1997)**
  - However, the appellate panel, in a 2-1 split, struck down the other waters rule on statutory grounds. It noted that Congress did not expressly authorize the Corps to regulate isolated wetlands in the Clean Water Act.
  - Split on sidecasting.
Cases

  - Migratory birds rule struck down on statutory grounds
  - Other waters rule not addressed
Section 404 authorization not required

- Incidental movement, authorized dredging
- Grandfathered activities (existing mines, etc.)
- Normal farming, silviculture and ranching activities
  - Minor drainage
  - Farm & forest roads
Section 404 authorization not required

- Incidental redeposit
  - “Tulloch” rule (1992)
    - Incidental fallback
  - Nat’l Mining Ass’n. v. U.S. Army Corps of Engineers (D.C. Cir. 1998)
  - U.S. v. Deaton (4th Cir. 2000)
    - Sidecasting - violates law
Mitigation as a Permit Condition

- Avoidance
- Minimization
- Rectification
- Compensation
Mitigation banking

- Same watershed
- Adequacy of constructed wetland
- Monitoring
Delineation of wetlands

- Agricultural
- Nonagicultural
- Characteristics
  - Hydrology
  - Soils
  - Vegetation
Swampbuster

- Denies farm program benefits to violators
- More restrictive than section 404
- Prior converted wetlands (1986)