

REAL ESTATE TRANSACTIONS INVOLVING WETLANDS

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I. Wetland Laws and Regulations

A. The Basis of Federal Wetland Regulation is the Federal Water Pollution Control Act (Clean Water Act): 33 U.S.C. § 1251 et seq.

i. Section 301: generally prohibits a “discharge into a navigable water” unless otherwise authorized by a permit (33 U.S.C. § 1311(a))

ii. More specifically defined, Section 301 prohibits “any addition of any pollutant to navigable waters from any point source” (33 U.S.C. § 1362(12))

1. Pollutant is defined broadly to include “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munition, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” (33 U.S.C. § 1362(6))

iii. The two most common Permits for discharge are:

1. Section 402: National Pollutant Discharge Elimination System (NPDES) permit

2. Section 404: Wetland Permits

- a. Section 404 grants the Army Corps of Engineers authority to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites” (33 U.S.C., § 1344(a))
- b. Regulatory and judicial interpretation of this phrase dictate whether a particular wetland and particular activity are regulated by the CWA or permitted by Section 404

II. Determining the Scope of Section 404 Jurisdiction

A. Geographic Jurisdiction: is the area a “navigable water” subject to Section 404?

i. Statutory & Regulatory Background: Section 404 authorizes the discharge of “dredged or fill material into the navigable waters” only upon issuance of a permit

1. Is the area a “navigable water”

- a. if so, a permit is likely required for any discharge
- b. if not, no permit will be required (area not subject to CWA)

2. “navigable waters” is defined by the CWA as the “waters of the United States, including the territorial seas” (33 U.S.C. § 1362(7))

3. in turn, “waters of the United States” is presently defined by the Corps’ regulations to include, *inter alia*, the following:

a. “All **interstate** waters including **interstate** wetlands”

b. “All other waters such as intrastate lakes, river, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use degradation or destruction of **which could affect interstate or foreign commerce**” (33 C.F.R. 328.3(a)(3) (2001))

c. wetlands “adjacent to waters otherwise defined as “waters of the United States” by the Corps’ regulations (33 C.F.R. 328.3(a))

i. this adjacency definition captures within the Corps’ jurisdiction wetlands that may not be interstate, and thus it often plays a significant factor in determining whether a particular wetland is subject to the Corps’ jurisdiction

ii. “The term adjacent mean 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’.” (33 C.F.R. 328.3(c))

4. The Corps' and EPA's regulations define "wetlands" as follows:
 - a. "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 conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." (33 C.F.R. § 328.3(b); 40 C.F.R. § 230.3(t))
 - b. in short, wetlands are typically determined base on the presence of 3 parameters: soils, hydrology, and vegetation
5. Wetlands Delineations
 - a. The physical boundaries of a wetland are determined by a "delineation"
 - b. Corps and EPA each have delineation manuals outlining specific criteria and methodology to determine the physical boundaries (delineation) of the wetland
 - i. Corps' 1987 manual has become the standard presently used by most federal and state agencies
 - c. Corps determines the presence of wetlands and its jurisdiction through a Jurisdictional Determination
 - d. Written delineations after 1990 are valid for 3 years, and may be extended for up to 5 additional years
6. What about man-made features, e.g. ponds, drainage ditches, canals, etc.?
 - a. No distinction, as long as the wetlands indicators naturally occur under "normal circumstances"
7. Summary of "navigable waters"
 - a. navigable waters
 - b. tributaries to navigable waters
 - c. interstate wetlands
 - d. wetlands that could affect interstate or foreign commerce
 - e. wetlands adjacent to any of the above (i.e. adjacent to other waters of the United States)
 - f. BUT NOT isolated wetlands
- ii. Case Law and Interpretive Background:

1. Expansion of the Corps' jurisdiction over wetlands
 - a. *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.D. 1975)
 - i. Declared that Congress passed the CWA with the intent to assert federal jurisdiction over the nation's waters to the maximum extent possible under the commerce clause of the Constitution
 - b. Isolated Wetlands Rule (1977):
 - i. Corp's amended its regulations to define "navigable waters" to include "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the U.S."
 - c. *United States V. Riverside Bayview Homes*, 474 U.S. 121 (1985):
 - i. Upheld Corps' regulation defining "navigable waters" to include "adjacent wetlands," noting that Congress intended to regulate at least some waters that were not in fact navigable
 - d. Migratory Bird Rule (1986)
 - i. Corps amended its definition of "navigable waters" to include isolated, non-navigable, wholly intrastate wetlands that were used by migratory birds
2. Restriction of the Corps' jurisdiction over wetlands
 - a. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001)
 - i. Invalidated the Migratory Bird Rule (5-4 decision)
 - ii. Held that section 404(a) did not extend federal jurisdiction to isolated wetlands frequented by migratory birds
 - iii. Distinguished *Riverside* as limited to the issue of "adjacent wetlands" and there was a significant nexus between "adjacent" wetlands and "navigable waters"
 - b. *Rapanos v. United States & Carabell v. U.S. Army Corps of Engineers*, 547 U.S. 715 (2006)
 - i. Issue was jurisdiction of wetlands not immediately adjacent to traditionally navigable water (wetlands were 11-20 miles from traditionally navigable waters, and connected only by ditches and drains)
 - ii. Scalia plurality opinion

1. statutory text “navigable waters of the United States constrains jurisdiction
 2. CWA’s stated purpose to preserve the states’ roles is significant
 3. Plurality test: Corps has jurisdiction if the wetland is:
 - a. adjacent to “a relatively permanent body of water connected to traditional interstate navigable waters,” and
 - b. “has a continuous surface connection with that water”
 4. “Waters of the United States” does not include “intermittent”, “ephemeral”, or “periodic” channels
- iii. Kennedy concurrence
1. rejects plurality’s “relatively permanent waters” and “continuous surface connections” requirements
 2. use of the word “navigable” is significant
 3. Significant Nexus Test: wetlands are jurisdictional if
 - a. “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’.”
- iv. Stevens’ dissent
1. Supreme Court established jurisdiction in *Riverside Bayview*
 2. jurisdiction exists if either the plurality or Kennedy test is satisfied
- c. Circuit Courts and agencies after *Rapanos*:
- i. Either test: 1st, 8th, EPA, Corps
 - ii. Significant Nexus Test: 7th, 9th, 11th
 - iii. Not Decided: 5th, 6th, D.C.
 - iv. Corps has issued regulatory guidance on determining jurisdiction

III. Scope of Activities and Discharges Regulated by Section 404

- A. Is the proposed activity a regulated activity?

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

ii. Is it a “discharge” of “dredged or fill material”?

1. “discharge” defined under the CWA as “(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft” (33 U.S.C. § 1362(12))

iii. Accordingly, an activity is regulated if it involves the addition to navigable waters of dredged or fill material that is a pollutant from a point source

1. “pollutant” – defined the CWA

a. very expansive and includes most everything except pure water

b. rarely limits Section 404 jurisdiction

2. “point source” – defined by CWA

a. very expansive and includes any “pipe, ditch, channel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel” (33 U.S.C. § 1362(14))

b. also interpreted to include land-clearing equipment such as bulldozers, tractor-pulled rakes, excavators, backhoes, discing equipment. See *Avoyelles Sportsmen’s League v. Alexander*, 473 F. Supp. 525, 532 (W.D. La. 1979)

c. Rarely limits Section 404 jurisdiction

3. “fill material” – defined by Corps regulations

a. “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” (33 C.F.R. 323.2(e))

b. generally refers to material from outside the waterbody or wetland in question

c. includes rock, sand, soil, clay, plastics, construction debris, wood chips, mining overburden

d. excludes trash and garbage

4. “discharge of fill material” means the “addition of fill material into waters of the United States.” (33 C.F.R. 323.2(f)) Corps regulation gives nonexclusive list of examples of “discharge of fill material” including:

- a. placement of fill for construction of structures
- b. any structure requiring rock, sand, or dirt
- c. dams and dikes
- d. levees
- e. pilings

5. “dredged material” – defined by Corps regulations

- a. “material that is excavated or dredged from water of the United States” (33 C.F.R. 323.2(c))
- b. generally refers to material that comes from the waterbody or wetland in question

6. “discharge of dredged material” means “any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, water of the United States” (33 C.F.R. 323.2(d))

- a. does not include incidental additions and incidental fallback of dredged material

7. “addition” – not defined by CWA or Corps’ regulations

- a. the introduction of foreign material into regulated waters is a regulated “addition”
- b. issue centers on whether redepositing or incidental fallback of material into the same waters from which it was dredged, excavated, or cleared constitutes an “addition”

B. Exemptions

i. Certain activities that otherwise constitute a “discharge of dredged or fill material” are exempted from regulation (33 U.S.C. § 1344(f))

- 1. discharges of dredged and fill material resulting from the following activities
 - a. normal farming, silvicultural, and ranching activities
 - b. maintenance of dams and bridges

- c. construction of certain irrigation or sedimentation systems
 - d. construction of forest and farm roads
 - e. some state-approved projects
- 2. routine discharges are exempt
- 3. one-time discharges resulting in permanent alterations are not exempt
- ii. Recapture Rule:
 - 1. excludes from Section 404(f) exemption of “any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced” (33 U.S.C. § 1344(f)(2))
 - 2. in other words, a wetland is recaptured by Section 404 jurisdiction if the exempted activity is no longer practiced
 - a. example: converting land from silviculture to soybean production subjected the activities to Section 404 regulation

IV. Section 404 Permitting Process: Understanding Nationwide and Regional General Permits and Individual Permits

A. General Permits

- i. Required for regulated discharges with minimal adverse effects
- ii. Issued on a nationwide, regional, or statewide basis
- iii. Lasts up to 5 years and are revocable by Corps if negative effects result or more appropriately regulated by individual permits
 - 1. Nationwide Permits (NWP’s)
 - a. designed to “regulate with little, if any, delay or paperwork certain activities having minimal impact” (33 C.F.R. 330.1(b))
 - b. NWP’s set forth the conditions for compliance
 - c. some NWP’s require a wetlands delineation
 - d. examples of issued NWP’s (see also the “Summary of the 2007 Nationwide Permit” handout):

- i. cranberry production
- ii. hydropower production
- iii. cleanup of hazardous and toxic waste
- iv. survey activities
- v. oil spill cleanup
- vi. single-family residential construction
- vii. boat ramps
- e. Notification to Corps
 - i. if all NWP conditions are satisfied, some permittees may proceed without notifying the Corps
 - ii. some NWPs require a Pre-Discharge Notification (PDN) – Corps has 30 days to notify applicant if activity does not qualify for NWP

2. Regional Permits

a. General permits but issued only on a regional basis

- 1. See, for example, discussion of Utah's Stream Alteration Program which is based, in part, on a Regional Permit

B. Individual Permits

- i. Required for potentially significant impacts
- ii. Procedure
 - 1. application
 - 2. public notice (and sometimes public hearing) for proposed project
 - 3. compliance with other statutes (NEPA, ESA, CZMA, NHPA)
 - 4. record of decision/statement of findings and permit
 - a. Corps makes determination based on certain criteria (see below)
 - b. EPA has ultimate authority – it may veto Corps' issuance of a permit or place additional restrictions of the permit
- iii. Criteria for Permit Issuance

1. 404(b)(1) Guidelines (administrative regulations promulgated by EPA)
 - a. If proposed activity does not comply with the guidelines, permit will be denied
 - b. If proposed activity complies with the guidelines, permit will be issued “unless issuance would be contrary to the public interest” (see public interest review, below)
 - c. Guidelines (40 C.F.R. 230.10(a)-(d)):
 - i. No permit if there is a practicable alternative to the proposed discharge
 1. Non-water dependent activities: practical alternatives are presumed to exist
 - ii. No permit if discharge will cause or contribute to significant degradation of waters of the United States
 - iii. No permit unless practicable mitigation steps taken (see below)
 - iv. No permit if violation of other water quality statutes or other statutes (CWA § 307, ESA, state standards, etc.)
2. Public Interest Review
 - a. Evaluation of probable impact of the proposed activity and its intended use on the “public interest” (33 C.F.R. 320.4(a))
 - b. Case-specific weighing of factors, e.g. conservation, economics, aesthetics, general environmental concerns, historic value, fish and wildlife, flood damage prevention, water supply and conservation, water quality, energy, etc
 - c. Permit granted unless permit would be contrary to the public interest
3. Mitigation: Corps/EPA have a goal of “no net loss” of wetlands
 - a. Avoidance
 - i. 404(b)(1) Guidelines require no practicable alternative
 - ii. This requires avoiding adverse impacts when practicable
 - b. Minimization
 - i. If impacts are unavoidable, permittee must minimize the impacts such as altering the discharge location, the discharge material, controlling material

after discharge, methods of dispersion, technology, timing of discharges etc. (40 C.F.R. 230.70)

c. Compensation

i. If impacts remain after avoidance and minimization, permittee must provide compensatory mitigation (40 C.F.R 203)

ii. Primarily involves restoration, enhancements, creation, and reservation of wetlands

iii. Generally compensation is 1-to-1 ratio (acres)

d. Mitigation banking:

i. Alternative to traditional compensatory mitigation

ii. A bank "sponsor" implements mitigation activities in particular wetland locations to offset wetlands impacts elsewhere, and sells mitigation credits to others

iii. Sponsor can be a public or private entity

iv. States and EPA regions ration credits for wetlands development

e. In-Lieu-Fee Mitigation

i. Alternative to traditional compensatory mitigation

ii. Permittee pays in-lieu fee by providing funds to a third party that is implementing a mitigation project

C. Stream Alteration Permits

In Utah a hybrid Federal and State Permit which regulates the alteration of perennial and ephemeral streams and stream beds program that is administered by the State Engineer is the Stream Alteration Permit program. Before anyone can alter a natural stream channel, including intermittent streams and most washes, a permit must be obtained. Most construction or stream improvement activities are considered alterations and are regulated by this law. The authority to regulate stream alterations has two sources. First in Utah Code Ann. 73-3-29 provides:

§ 73-3-29. Relocation of natural streams – Written permit required – Emergency work – Violations

(1) except as provided in Subsection

(2) a state agency, county, city, corporation or person may not relocate any natural stream channel or alter the beds and banks of any natural stream without first obtaining the written approval of the state engineer.

(2) (a) The state engineer may issue an emergency permit or order to relocate a natural stream channel or alter the beds and banks of a natural stream as provided by this Subsection (2) and section 63G-4-S02.

(b) If an emergency situation arises which involves immediate or actual flooding and threatens injury or damage to persons or property, steps reasonably necessary to alleviate or mitigate the threat may be taken before a written permit is issued subject to the requirements of this section.

(c)(i) If the threat occurs during normal working hours, the state engineer or the state engineer's representative must be notified immediately of the threat. After receiving notification of the threat, the state engineer or the state engineer's representative may orally approve action to alleviate or mitigate the threat.

(ii) If the threat does not occur during normal working hours, action may be taken to alleviate or mitigate the threat and the state engineer or the state engineer's representative shall be notified of the action taken on the first working day following the work.

(d) A written application outlining the action taken or the action proposed to be taken to alleviate or mitigate the threat shall be submitted to the state engineer within two working days following notification of the threat to the state engineer or the state engineer's representative.

(e)(i) The state engineer shall inspect in a timely manner the site where the emergency action was taken.

(ii) After inspection, additional requirements, including mitigation measures, may be imposed.

(f) Adjudicative proceedings following the emergency work shall be informal unless otherwise designated by the state engineer.

(3) An application to relocate any natural stream channel or alter the beds and banks of any natural stream shall be in writing and shall contain the following:

(a) the name and address of the applicant;

(b) a complete and detailed statement of the location, nature, and type of relocation or alteration;

(c) the methods to be employed;

(d) the purposes of the application; and

(e) any additional information that the state engineer considers necessary, including, but not limited to, plans and specifications of the proposed construction of works.

(4)(a) The state engineer shall, without undue delay, conduct investigations that may be reasonably necessary to determine whether the proposed relocation or alteration will:

(i) impair vested water rights;

(ii) unreasonably or unnecessarily affect any recreational use or the natural stream environment;

(iii) unreasonably or unnecessarily endanger aquatic wildlife; or

(iv) unreasonably or unnecessarily diminish the natural channel's ability to conduct high flows.

(b) The application shall be approved unless the proposed relocation or alteration will:

(i) impair vested water rights;

(ii) unreasonably or unnecessarily adversely affect any public recreational use or the natural stream environment;

(iii) unreasonably or unnecessarily endanger aquatic wildlife; or

(iv) unreasonably or unnecessarily diminish the natural channel's ability to conduct high flows.

(c) The state engineer may approve the application, in whole or in part, with any reasonable terms to protect vested water rights, any public recreational use, the natural stream environment, or aquatic wildlife.

(5) No cost incurred by the applicant, including any cost incurred to comply with the terms imposed by the state engineer, is reimbursable by the Division of Water Rights.

(6) Except as provided in Subsection (2), a person who knowingly or intentionally relocates any natural stream channel, or alters the bed or bank of any natural stream channel without first obtaining the written approval of the state engineer is guilty of a crime punishable under Section 73-2-27.

Second, the United States Army Corps of Engineers has issued Programmatic General Permit 40 to the State of Utah. This Permit, under Section 404 of the Clean Water Act, allows the state to issue stream alteration permits in compliance with the Clean Water Act. Thus issuance of a stream alteration permit assures that work done in compliance with the permit will comply with both state and federal law.

The State Engineer's office administers a Stream Alteration Program with the purpose of regulating activities affecting the bed or banks of natural streams. The State Engineer has by Rule defined many of the relevant terms. Those definitions are found in **R655-13-4.**

Definitions

(1) Alteration: To obstruct, diminish, enhance, destroy, alter, modify, relocate, realign, change, or potentially affect the existing condition or shape of a channel, or to change the path or characteristics of water flow within a natural channel. It

includes processes and results of removal or placement of material or structures within the jurisdiction delineated in this rule.

(2) Bankfull discharge: The flow corresponding to the elevation of the water surface, in a natural stream, where overflowing onto the floodplain normally begins.

(3) Bank(s): The confining sides of a natural stream Channel, including the adjacent complex that provides stability, erosion resistance, aquatic habitat, or flood capacity.

(4) Bed: The bottom of a natural stream channel.

(5) Canopy: Mature riparian woody vegetation, usually referring to limb and leaf overhang.

(6) Channel: The bed and banks of a natural stream.

(7) Clearance: The vertical distance between a given water surface and the lowest point on any structure crossing a natural channel.

(8) Ecology: A branch of science concerned with the interrelationship of organisms and their environment.

(9) Ecosystem: The assemblage of organisms and their environment functioning as an ecological unit in nature.

(10) Floodplain: The maximum area that will accommodate water when flow exceeds bankfull discharge.

(11) Flowline: The lowest part of a streambed when viewed in cross-section.

(12) Fluvial: 1: Of, relating to, or living in a stream or river, 2: Produced by stream action.

(13) Gradient: Elevation change per unit length.

(14) Natural stream: Any waterway, along with its fluvial system, that receives sufficient water to sustain an ecosystem that distinguishes it from the surrounding upland environment.

(15) Reference reach: A portion or segment of a natural stream channel that shows little or no indication of alteration.

(16) Revegetation: The planting of salvaged plants, containerized plants, cuttings, seeds, or other methods to produce a desired plant community.

(17) Riparian corridor: The vegetation zone associated with a natural stream environment.

(18) Riprap: Preferably hard, well-graded, angular rock, sufficient in size and density to remain stationary during high flows.

(19) State Engineer: Director of the Division of Water Rights.

(20) Waterway: A topographic low that collects and conveys water.

The rule describing Jurisdiction is found in Rule **R655-13-5. Jurisdiction:**

(1) For the purposes of determining the need to obtain an approved stream alteration application, it is necessary to review the criteria outlined in

Section 73-3-29(4)(a). The items, and thus the adopted jurisdictional limits, must be investigated by the state engineer before making a determination on a proposed stream alteration. The state engineer shall conduct investigations that may be reasonably necessary to determine whether the proposed alteration will;

(a) impair vested water rights. In order to determine if vested water rights could be impaired, it is necessary to determine if: stream flows are being modified; the geometry of the bankfull channel will change; or the proposal will have any effect on the diversion, collection, or distribution appurtenances associated with the water right within the jurisdictional limits presented in sections R655-13-15(1)(b) below. In evaluating a proposed stream alteration, the state engineer must consider the proposal's impact on any diversion collection or distribution structure which could be affected even though they are located outside of the channel.

(b) unreasonably or unnecessarily affect any recreational use or the natural stream environment, the natural stream environment consists of the stream, the conveyed water, the adjoining vegetative complex, and the habitat provided by the abutting riparian zone. Evaluation of impacts to recreational use must factor in the hydrology of the stream, manmade structures detrimental to recreational use and the riparian zone's ability to keep the system erosion resistant. The jurisdictional limit to be used to evaluate the impacts on recreational use and the natural stream environment will be the greater of the two as follows:

(i) The observed riparian zone or canopy drip line of a undisturbed reference reach; or

(ii) two times the bankfull width from the bankfull edge of water in a direction perpendicular to the flow and away from the channel up to a maximum of 30 feet.

(c) unreasonably or unnecessarily endanger aquatic wildlife, any changes made to a natural stream that affect the geometry, water quality, flows, temperature, and vegetative cover may endanger aquatic wildlife. The jurisdictional limit, when considering the impacts to aquatic wildlife, is taken to be obtained within the limit established under R655-13-5(1)(b).

(d) unreasonably or unnecessarily diminish the natural channel's ability to conduct high flows. Changes in cross-sectional geometry, grade, surface, roughness, sediment load, in-stream structures, levees, and floodplain development, can have an influence on a channel's ability to conduct high flows. The objective in evaluating a stream's ability to conduct high flows is not to attempt to provide a certain level of protection (i.e. 100 year even), but rather to make sure that the losses in the natural stream's carrying capacity are minimized. It is important to recognize that the

hydraulic capability of a natural stream, at a section on the stream, is a three dimensional issue an alterations at a point can change the carrying capacity of the stream both upstream and downstream of the actual stream alteration. The jurisdictional area, when considering the channel's hydraulic capacity, must include the bankfull stream channel and in many cases portions of the floodplain which have been observed conducting or storing water during high flows events or show physical evidence of conducting or storing water during high flows.

(2) Any work proposed in any of the preceding identified jurisdictional limits will require an approved stream alteration application.

Other Rules address the requirements of an Application and specific stream alteration activities.

IV. Recent Developments in Wetland Laws and Regulations

A. Jurisdiction

i. Post-*Rapanos* cases continue to interpret *Rapanos* and define the boundaries of Corps jurisdiction, with no consensus emerging yet

1. *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007)

B. Mitigation

i. 2008 Wetlands Compensatory Mitigation Rule:

1. applies equivalent standards to all forms of mitigation;

2. 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;

3. simplifies the process for using existing mitigation banks by clearly stating that approved banks are able to compensate for all permitted impacts;

4. makes the process of establishing a mitigation bank more predictable by establishing disciplined timelines for the review of bank proposals; and

5. does not change the “when,” but the “where” and “how” compensatory mitigation is required.

C. Takings Claims: *Koontz v. St. Johns River Water Management District*, 570 U.S. ____ (2013)

In *Koontz* the United States Supreme Court ruled that regulation of wetlands may be a taking for which the Fifth Amendment to the United States Constitution provides the property owner the right to just compensation. In *Koontz* the St. Johns River

Water Management District, a regulatory entity under Florida law, rejected *Koontz*' proposal to dredge 3.7 acres of wetland on his property and dedicate the balance of the property, 11 acres, via a conservation easement as a perpetual wetland preserve. Instead the Districts required additional off site wetlands mitigation or alternatively to reduce the development from 3.7 to 1 acre.

Koontz rejected both options and challenged the District requirements as illegal exactions. The appeal went through the Florida State Court System and was taken up by the United States Supreme Court.

The Supreme Court applied the well-established Fifth Amendment exaction-takings analysis first enunciated by the Supreme Court in *Nollan v. California Coastal Commission* and later refined in *Dolan v. City of Tigard*.^[1] In *Nollan*, the Supreme Court considered whether the California Coastal Commission's exacting a beach access easement as a condition for a building permit to reconstruct a beachfront house constituted a taking.^[2] Ten years later in *Dolan*, the Court considered whether a municipality's requirement to dedicate bike path and stream flooding easements constituted a taking when a plumbing supply store sought to expand.^[3] In both cases, the Court found that the required exactions constituted takings. The Court in *Dolan* created the current test: a two-pronged examination of the balance between: (1) the exaction; and (2) the impacts of the proposed development.^[4]

The first prong examines the nexus between the impact and the exactions.^[5] *Dolan* stresses that the government may seek exactions to offset development impacts, but such exactions must relate to the impacts created by the development.^[6] The government cannot convert a land-use approval process into an excuse to capture and take without compensation a property interest unrelated to the impact of the development.^[7] The second prong *Dolan* introduced is "rough proportionality." After demonstrating an "essential nexus," the government must then show the permit conditions are "roughly proportional" to the impact created by proposed use.^[8] The nexus/rough proportionality test determines whether an exaction is necessary to address the public impact created by the property owner's proposed activity or if the exaction is merely an opportunity to acquire a property of someone who needs a government approval, license, or permit.^[9] To pass the rough proportionality/nexus test and be deemed non-compensable, an exaction must correlate to both the type and scope of impact on the public, created by the approval given.

Traditional exaction analysis—the *Nollan/Dolan*, nexus/rough-proportionality test—is widely used in the land use approval context. Since the test is based on the constitutional protection against taking of property without just compensation the test is available to anyone in the nation who believes that an exaction required as a condition of a land use approval is a taking without just compensation. The court's two-step nexus-and-"rough-proportionality" test is best viewed as an attempt to

ensure property exactions relate appropriately to development impacts. The Supreme Court did not elaborate on what the phrase means exactly but it did explain that proving the degree of the relationship will not require a high degree of precision.^[10] According to one commentator, the Court found “the type and extent of the exaction must be justified by the need to address a development-related impact.”^[11] This proportionality does not require mathematical precision. “Rough proportionality” reflects balancing legislative extortion and permitting local governments to engage in legitimate land use practices.

Utilizing the *Nollan/Dolan*, nexus/rough-proportionality analysis the Court found that the District’s exactions, both of property and monetary, constituted a compensable taking for which *Koontz* was entitled to just compensation under the Fifth Amendment. While the *Koontz* decision does not have an immediate impact on federal wetland regulation, it does constitute a “shot across the bow” and indicates that there is a line which, if crossed, is a regulatory taking for which compensation is required. If federal wetland regulation will be impacted by *Koontz* remains to be seen.

VI. Spotting Wetland Issues in Real Estate Development

- A. Is there a wetland on the property?
 - i. know what to look for (signs of wetlands)
 - 1. vegetation, soil, presence of water
 - ii. Be careful – sometimes there may not be any surface water, or the property may not look like a wetland
- B. If there is a wetland, is it within Sections 404 jurisdiction?
- C. What activity will be done in the wetland?
 - i. Is the activity regulated?
 - ii. Is the activity exempt from regulations?
- D. Does your activity (discharge) qualify for a permit?
 - i. General Permit (NWP)?
 - ii. Individual Permit?
- E. What are the physical boundaries of the wetland?
 - i. Wetland delineation

1. Can be performed by consultants or by Corps district engineers
 2. Corps then visits the site and reviews the survey lines
- ii. Jurisdictional Determination is then issued by the Corps identifying the physical boundaries of the wetland and whether the wetland is regulated by Section 404
- F. If you are required to obtain an individual permit, have the following conditions been satisfied?
- i. Section 404(b)(1) Guidelines
 - ii. Public Interest Review
 - iii. Other laws (NEPA, ESA, National Historic Preservation Act, etc.)
 - iv. Mitigation
- G. Are there any state laws governing the wetland?
- H. When do you notify the Corps?
- I. Are there constitutional takings issues?

VII. Enforcement of Wetland Laws and Regulations

- A. Discharges of dredged or fill material into waters of the United States without a permit (or not otherwise exempted), or in violation of Section 404 permit, may subject the violator to administrative, civil, and/or criminal enforcement actions
- B. Civil Suit Remedies
- i. Injunctive relief: restoration of wetlands, or mitigation
 - ii. Civil penalties (fines)
- C. Private suit liability
- i. CWA grants citizens a private right of action (33 U.S.C § 1365), but this is used less frequently to enforce Section 404

[1] *Nollan v. Cal. Coastal Comm'n.*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

[2] *Dolan*, 512 U.S. 374.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* at 386–8.

[7] *Id.* at 390 (quoting *Simpson v. North Platte*, 206 Neb. 240, 245, 292 N.W2d 297, 301(1980)).

[8] *Id.* at 388–396.

[9] *See id.*

[10] *Id.* at 391.

[11] Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U.L. REV. 513 (1995).