Federal and State Roles in Protecting Wetlands

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WETLANDS
Regulatory Definitions of Wetlands

Corps/EPA:
“areas that are inundated or saturated by surface 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.”

Fish and Wildlife Service:
Areas having at least one of the following characteristics:
1. Periodically supports aquatic plants;
2. Has substrate that remains saturated long enough to support aquatic vegetation; and,
3. Covered with shallow water at some time during the growing season.
Wetland Delineations
1987 Corps-EPA MOA on Wetland Delineations

- “Day to day” wetland determinations were delegated to the Corps; however, the EPA retained the authority to make wetland determinations in “special cases.”

- Corps must adhere to EPA guidelines and agency decisions concerning the geographic scope of the 404 program.
Wetland Functions and Values

- Prevent flooding and erosion
- Filter out harmful pollutants
- Habitat for endangered species
- Nesting grounds for birds and spawning grounds for commercial fish
- Source of recreation and income
Wetland Losses in Conterminous United States

1700’s: 221 million acres

1990’s: 105.5 million acres

52% loss
Southeast Wetland Losses

- Mid 1950's - 1970's: 386,000 acres per year
- Mid 1970's - 1980's: 259,000 acres per year
Corps’ Regulatory Authority

- Section 10 of the Rivers and Harbors Act of 1899

- Section 404 of the Clean Water Act of 1972
Section 10

- Extends to the Ordinary High Water Mark of Navigable Waterbodies

- Requires Permit for all Activities affecting the Water’s Course, Location, Condition and Capacity
Clean Water Act Section 404

Authorizes Corps to regulate:

Discharge of Dredged or Fill Material into Waters of the U.S.
WATERS OF THE U.S.

- Navigable Waters
- Interstate Waters
- Other Waters, The Use, Degradation or Destruction Of Which Could Affect Interstate Commerce
- Impoundments
- Tributaries To Any Of The Above
- Territorial Seas
- Wetlands Adjacent To Any Of The Above
Navigable Waters

Water presently used, historically used, or susceptible to use for transport of interstate or foreign commerce.
Corps Expands “Navigable Waters”

- Phase I (1975): navigable waters and adjacent wetlands.
- Phase II (1976): Lakes over five acres and adjacent wetlands and tributaries to Phase I waters.
- Phase III (1977): All other waters of the United States which are necessary for water quality.
Challenges to Corps’ Authority

(1985) U.S. v. Riverside Bayview Homes

**led to the inclusion of all wetlands adjacent to navigable or interstate waters and tributaries under “navigable waters”**

Decision’s Impact

404 becomes Corps’ primary statutory authority to regulate wetlands

Caused confusion over Corps’ jurisdiction
Waters that could affect interstate commerce

- Migratory Bird Rule
- Waters which make up an endangered species habitat.
- Waters used to irrigate crops sold in interstate commerce.
(1990-1993) Circuits Split over Corps Jurisdiction


Migratory bird rule not connected to the term “navigable.” *United States v. Wilson* (4th Cir. 1997)

(2001) Solid Waste Agency of Northern Cook County v. Corps “SWANCC”
SWANCC:

Based on lack of authority under the CWA, Corps could no longer claim jurisdiction of intrastate isolated nonnavigable waterways using the migratory bird rule.
Interpretations of SWANCC

Narrow interpretation: SWANCC only invalidated the migratory bird rule. Corps can assert jurisdiction over non-navigable or isolated waters that connect in some way to interstate or navigable waters.

Broad interpretation: Corps can only regulate waters that are either navigable in fact or law and its adjacent wetlands.
What happens now?

- How far will the courts go to find a navigable water connection?

- Corps must establish a sufficient nexus between the subject water body and a navigable water.

- How will courts interpret adjacency?
Navigable Waters
Interstate Waters
Other Waters, The Use, Degradation or Destruction Of Which Could Effect Interstate Commerce
Impoundments
Tributaries To Any Of The Above
Territorial Seas
Wetlands Adjacent To Any Of The Above
Wetland losses in Mississippi

Total Loss = 59%
Primary causes of wetland loss in Mississippi

- Conversion to agriculture
- Commercial and residential development
- Agricultural and industrial runoff
- Highway and flood control projects
The Mississippi Approach

- Coastal Wetlands Protection Act
- The Mississippi Coastal Program
- The 401 Water Quality Certification Program
- The Mississippi Air and Water Pollution Control Law
- The Mississippi Storm Water Management District Act
- Wildlife Heritage Fund
- Migratory Waterfowl Stamp Program
- Mississippi Natural Heritage Law of 1978
Mississippi’s Coastal Wetlands

Coastal Wetlands Protection Act

The Mississippi Coastal Program
Mississippi’s Freshwater Wetlands

- Latest assessment revealed 4,067,000 acres
- Covers 14% the state’s land surface
- State legislature has not enacted a law specifically designed to regulate freshwater wetlands
401 Water Quality Certification Program

Required before issuance of 404 permit

Administered by MDEQ

1. Feasible alternative?
2. What are the direct impacts?
3. Compliance with water quality standards and designated uses?
The Mississippi Air and Water Pollution Control Law limits state regulatory authority to “waters of the State.”

To not be considered a “water of the State” the waterbody must be hydrologically landlocked on private property and not subject to regulation under the CWA.
The Fish and Wildlife Classification

- Fishing
- Support aquatic life and wildlife
- Secondary contact
Problems Associated with Fish & Wildlife Classification

What about other wetland values like flood prevention and pollution control?
Hypothetical
Proposed changes

Adopt a Wetlands Protection Act

vs

Amend existing laws

vs

New MDEQ regulations
Options in Mississippi

LOCAL GOVERNMENTS
- The Mississippi Storm Water Management District Act

PRIVATE CITIZENS
- Wildlife Heritage Fund
- Migratory Waterfowl Stamp Program
- Mississippi Natural Heritage Law of 1978
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