

Table of Contents

PART A. FEDERAL WETLANDS LAW

CHAPTER 1. INTRODUCTION AND ORGANIZATION

- § 1:1 Introduction
- § 1:2 Scope and organization

CHAPTER 2. OVERVIEW AND HISTORICAL EVOLUTION OF WETLANDS REGULATION

- § 2:1 Overview
- § 2:2 —Agencies regulating wetlands
- § 2:3 —Wetlands functions
- § 2:4 —Wetlands quantities and losses
- § 2:5 Historical evolution of wetlands regulation
- § 2:6 —The Rivers and Harbors Act
- § 2:7 —The Clean Water Act
- § 2:8 —Extending jurisdiction above mean high water
- § 2:9 —Major regulatory developments since 1980

CHAPTER 3. REGULATION OF WETLANDS BY FEDERAL AGENCIES AND STATES

- § 3:1 The interrelated regulatory authorities of the Corps of Engineers (Corps) and the Environmental Protection Agency (EPA)
- § 3:2 Organization of the Corps as to wetlands regulation
- § 3:3 —Corps Waterways Experiment Station
- § 3:4 Organization of EPA as to wetlands regulation
- § 3:5 Assumption of wetlands program by states

CHAPTER 4. FEDERAL WETLANDS AND RELATED JURISDICTION

- § 4:1 Introduction
- § 4:2 Overview of steps for obtaining a wetlands determination
- § 4:3 Statutory and regulatory criteria for wetlands determination
- § 4:4 Elementary methods of making a wetlands determination
- § 4:5 Use of private experts in making wetlands determinations
- § 4:6 Criteria for Corps' jurisdictional determination: Corps' regulation and manual
- § 4:7 Corps' regulation defining waters of the United States
- § 4:8 —Exclusions from waters of the United States
- § 4:9 —Normal circumstances factor
- § 4:10 Interstate commerce requirement for jurisdiction
- § 4:11 Corps early policy on interstate commerce and regulation of isolated wetlands
- § 4:12 Corps curtailment of restricted jurisdiction due to interstate commerce
- § 4:13 Bird use as a basis to establish interstate commerce
- § 4:14 *United States v. Wilson* limits Corps authority in the Fourth Circuit based on interstate commerce requirement

- § 4:15 Other interstate commerce rulings prior to the Supreme Court's *Solid Waste Agency* ruling
- § 4:16 *Solid Waste Agency* ruling and aftermath
- § 4:17 *Rapanos* ruling and subsequent court decisions on "relatively permanent" and "significant nexus"
- § 4:18 Sackett v. Environmental Protection Agency and aftermath
- § 4:19 Corps of Engineers wetlands delineation manual
- § 4:20 Judicial rulings on Corps' wetlands determinations
- § 4:21 Key wetland factors: water, vegetation and soil
- § 4:22 Wetlands jurisdiction under the Rivers and Harbors Act
- § 4:23 —Jurisdiction exclusively under the Rivers and Harbors Act
- § 4:24 —Navigable waters jurisdiction
- § 4:25 — —Corps regulatory definition of navigable waters
- § 4:26 — —Judicial interpretations of navigable waters jurisdiction
- § 4:27 — —Mean high water and ordinary high water as the lateral extent of navigable waters jurisdiction
- § 4:28 Rivers and Harbors Act jurisdiction over areas that in their natural state would be wetlands and over uplands that have become navigable water
- § 4:29 Jurisdiction over unconnected canals
- § 4:30 Miscellaneous Rivers and Harbors Act rulings
- § 4:31 Activities subject to wetlands jurisdiction
- § 4:32 —Discharge of a pollutant from a point source
- § 4:33 —Dredging
- § 4:34 —Filling
- § 4:35 —Draining
- § 4:36 —Ditches
- § 4:37 —Pilings
- § 4:38 —Landclearing
- § 4:39 — —Fifth Circuit decisions on landclearing
- § 4:40 — —Corps regulation of landclearing
- § 4:41 —Landfill

CHAPTER 5. EXEMPTIONS FROM CORPS REGULATIONS OR INDIVIDUAL PERMIT REQUIREMENTS

- § 5:1 Types of exemptions
- § 5:2 Statutory exemptions
- § 5:3 —Inapplicability of Section 404(f) exemptions: recapture provision
- § 5:4 —Corps/EPA memorandum on applicability of the Section 404(f) statutory exemptions
- § 5:5 —Corps regulatory guidance letters on applicability of the Section 404(f) statutory exemptions
- § 5:6 —EPA regulations on applicability of the Section 404(f) statutory exemptions
- § 5:7 Statutory Exemptions: § 404(r)
- § 5:8 Regulatory exemptions from individual permit requirement through nationwide and other permits
- § 5:9 —General permits
- § 5:10 —Nationwide permit program
- § 5:11 — —Nationwide permits
- § 5:12 — —NWP Conditions

TABLE OF CONTENTS

- § 5:13 — —Notification of NWP by landowner and Corps determination
- § 5:14 — —Water quality certification and coastal consistency determination
- § 5:15 — —Relation to individual permit
- § 5:16 — —Corps discretionary override authority
- § 5:17 — —Judicial review of issuance and denial of nationwide permit and general permits
- § 5:18 — —Applicability of NEPA and other statutes to nationwide permits
- § 5:19 Exemptions in preamble to Corps regulations
- § 5:20 § 404(r) Authorization for Congressionally Approved Federal Projects

CHAPTER 6. THE PERMIT PROCESS

- § 6:1 Permit procedures applicable to private, Corps, and other federal activities
- § 6:2 Completing the permit application form and requirement to include all activities related to the same project
- § 6:3 Corps procedures for decision
- § 6:4 — —Public notice and comment
- § 6:5 — —Opportunity for conflict resolution
- § 6:6 — —Public hearing
- § 6:7 — —Other procedures and requirements
- § 6:8 — —Corps permit decision
- § 6:9 — —Corps permit duration
- § 6:10 Corps criteria for permit issuance
- § 6:11 — —For jurisdictional areas other than wetlands
- § 6:12 — —For wetlands and other special aquatic sites
- § 6:13 EPA section 404(b)(1) guidelines use as review criteria
- § 6:14 EPA § 404(b)(1) guidelines use as review criteria—Practicable alternatives and water dependency criteria
- § 6:15 — —Regulatory criteria
- § 6:16 — —Applicability of criteria based on applicant's or public's need
- § 6:17 — —Judicial decision on practicable alternatives
- § 6:18 — —Practicable alternatives and water-dependency criteria—Judicial decisions on practicable alternatives—Decisions unfavorable to landowners
- § 6:19 — —Practicable alternatives and water dependency criteria—Judicial decisions on practicable alternatives—The *Sweedens Swamp* case
- § 6:20 — —Practicable alternatives and water-dependency criteria—Judicial decisions on practicable alternatives—Decisions favorable to landowners
- § 6:21 — —Practicable alternatives and water dependency criteria—Corps headquarters decisions on practicable alternatives
- § 6:22 — —Significant degradation of waters and effect on functions criteria
- § 6:23 Scope of review of the permit application
- § 6:24 — —Issues related to scope
- § 6:25 Scope review of the permit application—Corps 1988 amended regulations
- § 6:26 Scope of review of the permit application—Judicial decisions on scope of review
- § 6:27 Consideration of non-wetlands environmental effects
- § 6:28 — —Corps regulations and practice
- § 6:29 — —Judicial review
- § 6:30 Consideration of socioeconomic effects
- § 6:31 — —*Mall Properties v. Marsh*
- § 6:32 — —Corps regulatory guidance letter
- § 6:33 — —Judicial review of socioeconomic effects

- § 6:34 Consideration of indirect effects
- § 6:35 *[Reserved]*
- § 6:36 Consideration of indirect effects—Corps regulatory guidance letters
- § 6:37 Use of mitigation in the permit process
- § 6:38 —Historical evolution of mitigation policy
- § 6:39 —Mitigation generally
- § 6:40 —Corps and EPA positions on mitigation prior to 1989 memorandum of agreement
- § 6:41 —Memorandum of agreement on mitigation
- § 6:42 Use of mitigation in the permit process—subsequent mitigation regulations that have now been eliminated
- § 6:43 Use of mitigation in the permit process—2001 guidance on mitigation
- § 6:44 —2008 mitigation regulation
- § 6:45 Principles of delivery for mitigation bank decisions
- § 6:46 Use of mitigation in the permit process—Transportation Act preference for mitigation banking
- § 6:47 Mitigation litigation
- § 6:48 Use of mitigation in the permit process—Role of Fish and Wildlife Service in mitigation
- § 6:49 EPA and Fish, Wildlife Service, and National Marine Service commenting authority
- § 6:50 —Memoranda of agreements
- § 6:51 —Revisions to the memoranda of 1982
- § 6:52 —Revisions eliminating interim review levels—elevation requests
- § 6:53 —Revisions to the memoranda of 1985
- § 6:54 —Revisions to the memoranda of 1992
- § 6:55 —Court decisions on agency commenting authority
- § 6:56 Other federal and state laws applicable to or approvals necessary for a § 404 permit
- § 6:57 —Water quality certification under § 401 of the Clean Water Act
- § 6:58 —Water quality certification in the Corps regulatory process
- § 6:59 —Water quality certification applicability to nationwide permits
- § 6:60 —Consistency with coastal zone management program
- § 6:61 —National Environmental Policy Act (NEPA)
- § 6:62 —General NEPA requirements
- § 6:63 —Responsibilities of Corps and the applicant to prepare and pay for NEPA studies
- § 6:64 —Whether an EIS is required
- § 6:65 —Consideration of project components outside waters of the United States
- § 6:66 —Consideration of subsequent project components or connected projects
- § 6:67 —Consideration of indirect impacts
- § 6:68 —Consideration of cumulative impacts
- § 6:69 —Consideration of mitigation
- § 6:70 —Consideration of beneficial impacts
- § 6:71 —Consideration of comments on EIS of other agencies, public controversy and uncertainty
- § 6:72 —Whether a Supplemental EIS is required
- § 6:73 —Public participation requirements as to environmental assessments
- § 6:74 —Miscellaneous judicial rulings
- § 6:75 —National Historic Preservation Act

TABLE OF CONTENTS

- § 6:76 — —Advisory council regulations
- § 6:77 — —Corps historic preservation regulations
- § 6:78 — —Compliance as to archeological sites
- § 6:79 — —National Historic Preservation Act-Court decisions on historic preservation requirements
- § 6:80 Other federal and state laws applicable to or approvals necessary for a Section 404 permit-National Historic Preservation Act-court decisions
- § 6:81 Other federal and state laws applicable to or approvals necessary for a § 404 permit—Endangered Species Act
- § 6:82 Essential Fish Habitat Requirements
- § 6:83 Executive Order 11990, “Protection of Wetlands”
- § 6:84 After-the-fact permit

CHAPTER 7. ROLE OF EPA

- § 7:1 Introduction
- § 7:2 Wetlands determinations
- § 7:3 —Ultimate authority rests with EPA: the *Civiletti* opinion
- § 7:4 —Memorandum of agreement on geographical jurisdiction
- § 7:5 Permit veto authority

CHAPTER 8. ENFORCEMENT

- § 8:1 Introduction
- § 8:2 Government’s enforcement authority
- § 8:3 —Administrative orders
- § 8:4 — —EPA administrative orders
- § 8:5 — —Corps administrative orders
- § 8:6 —Administrative penalties
- § 8:7 —Corps and EPA regulations
- § 8:8 —Referral for judicial enforcement
- § 8:9 —Memorandum of agreement between the Corps and EPA on § 404 enforcement
- § 8:10 *[Reserved]*
- § 8:11 Citizen suits
- § 8:12 —Citizen suit against the government
- § 8:13 — —The problem of which agency to sue
- § 8:14 — —Discretionary vs. nondiscretionary actions
- § 8:15 —Citizen suit against private entities and the government for discharge violations
- § 8:16 —Procedure and judicial criteria for citizen suit
- § 8:17 — —Notice and lack of state or federal enforcement action
- § 8:18 — —Requirement that the Corps or EPA have not undertaken enforcement
- § 8:19 — —Citizen suit exempt from federal rule requiring offer of settlement
- § 8:20 *[Reserved]*
- § 8:21 Citizen suits—Procedure and judicial criteria for citizen suit—Statute of limitations
- § 8:22 — —Requirement of continuing violation
- § 8:23 — —Requirement of bond for injunction
- § 8:24 —Environmental expenditures instead of civil penalties
- § 8:25 —Attorney’s fees
- § 8:26 —Citizen suit under the federal tort claims act

CHAPTER 9. JUDICIAL REVIEW AND LITIGATION

- § 9:1 Introduction

- § 9:2 —Administrative review
- § 9:3 Standing in wetlands litigation
- § 9:4 Ripeness—Generally
- § 9:5 —Court rulings on compliance orders and jurisdictional determinations
- § 9:6 *[Reserved]*
- § 9:7 Ripeness—Ripeness in other wetlands litigation
- § 9:8 Mootness
- § 9:9 Miscellaneous judicial review questions
- § 9:10 *De novo* review of the administrative record
- § 9:11 —Administrative law principles in wetlands cases
- § 9:12 —*De novo* review of Corps wetlands determinations disallowed
- § 9:13 —*De novo* review of Corps wetlands determinations permitted
- § 9:14 —*De novo* review of permit issuance
- § 9:15 —*De novo* review of permit denial
- § 9:16 —Summary judgment
- § 9:17 Statute of limitations and laches
- § 9:18 Standard of review
- § 9:19 Jury trial
- § 9:20 Attorney's fees and discovery costs
- § 9:21 Liability criteria
- § 9:22 —Strict liability
- § 9:23 —Personal liability of responsible employees
- § 9:24 — —Cases rejecting personal liability
- § 9:25 — —Cases finding personal liability
- § 9:26 Liability of permit applicant
- § 9:27 Responsible Corporate Officer Liability
- § 9:28 Liability criteria—Liability of purchasers of illegally filled wetlands
- § 9:29 Settlement
- § 9:30 Miscellaneous judicial criteria in wetlands litigation

CHAPTER 10. THE TAKINGS DEFENSE

- § 10:1 General takings theory
- § 10:2 *The Penn Central* Case: ad hoc criteria for determining takings
- § 10:3 Key Supreme Court takings decisions pertinent to wetlands subsequent to *Penn Central*
- § 10:4 Federal Claims Court jurisdiction
- § 10:5 Wetlands decisions on the takings defense

CHAPTER 11. OTHER DEFENSES

- § 11:1 Estoppel
- § 11:2 —Cases rejecting estoppel
- § 11:3 —Cases sympathetic to estoppel
- § 11:4 Denial of right to Corps hearing
- § 11:5 —Adjudicatory hearing
- § 11:6 — —The issue: is a formal hearing required by statute?
- § 11:7 — —§ 404 construed not to require a formal hearing
- § 11:8 —Public hearing
- § 11:9 Preemption by other permits, state lawsuits, or statutes
- § 11:10 —Federal Energy Regulatory Commission (FERC) license
- § 11:11 —State lawsuits and collateral estoppel
- § 11:12 Selective prosecution or treatment

TABLE OF CONTENTS

- § 11:13 Indispensable parties or lack of landowner as defendant
- § 11:14 Unauthorized suit
- § 11:15 Artificial wetlands or due to erosion
- § 11:16 Laches
- § 11:17 Lack of harm
- § 11:18 Bankruptcy defense
- § 11:19 Good faith or lack of knowledge
- § 11:20 Constitutional defenses

CHAPTER 12. JUDICIAL RELIEF FOR VIOLATIONS

- § 12:1 Statutory provisions and general judicial approach
- § 12:2 Restoration
 - § 12:3 —General criteria for restoration in wetlands cases
 - § 12:4 —Equitable balancing criterion
 - § 12:5 —Restoration required
 - § 12:6 —Restoration denied
 - § 12:7 —On-site versus off-site restoration
- § 12:8 Civil penalties
- § 12:9 Injunction
- § 12:10 Remand of Corps permit decision
- § 12:11 Miscellaneous relief considerations
- § 12:12 Administrative penalties
- § 12:13 Criminal prosecution

PART B. STATE WETLANDS AND COASTAL LAWS

CHAPTER 13. STATE WETLANDS AND COASTAL LAWS

- § 13:1 Introduction
- § 13:2 Wetlands and coastal zone laws and regulations of various states
 - § 13:3 —Alabama
 - § 13:4 —Alaska
 - § 13:5 —California
 - § 13:6 —Connecticut
 - § 13:7 —Delaware
 - § 13:8 —Florida
 - § 13:9 —Georgia
 - § 13:10 —Hawaii
 - § 13:11 —Idaho
 - § 13:12 —Indiana
 - § 13:13 —Iowa
 - § 13:14 —Louisiana
 - § 13:15 —Maine
 - § 13:16 —Maryland
 - § 13:17 —Massachusetts
 - § 13:18 —Michigan
 - § 13:19 —Minnesota
 - § 13:20 —Mississippi
 - § 13:21 —Nebraska
 - § 13:22 —New Hampshire

- § 13:23 —New Jersey
- § 13:24 —New York
- § 13:25 —North Carolina
- § 13:26 —North Dakota
- § 13:27 —Ohio
- § 13:28 —Oregon
- § 13:29 —Pennsylvania
- § 13:30 —Rhode Island
- § 13:31 —South Carolina
- § 13:32 —Texas
- § 13:33 —Vermont
- § 13:34 —Virginia
- § 13:35 —Washington
- § 13:36 —Wisconsin
- § 13:37 —Wyoming

APPENDICES

- APPENDIX 1. Section 404 of the Clean Water Act
- APPENDIX 2. Section 10 of the Rivers and Harbors Act of 1899
- APPENDIX 3. Corps of Engineers Wetland Regulations (33 C.F.R. 320–332)
- APPENDIX 4. Environmental Protection Agency 404(b)(1) Guidelines (33 C.F.R. 230.1–230.80)
- APPENDIX 5. Selected Corps’ Regulatory Guidance Letters
- APPENDIX 6. Nationwide Permits and Conditions
- APPENDIX 7. Clean Water Act Section 404(q), Memorandum of Agreement between EPA and Department of the Army (Aug. 11, 1992)
- APPENDIX 8. Instructions for Preparing a Department of the Army Permit Application
- APPENDIX 9. Corps of Engineers Offices: Addresses and Telephone Numbers of District and Division Offices
- APPENDIX 10. Environmental Protection Agency Headquarters and Regional Offices: Addresses and Telephone Numbers of Wetlands Sections

Table of Laws and Rules

Table of Cases

Index