2016 “Wetlands and Waters” Regulations

What are “Wetlands” Now?

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2016 “Wetlands and Waters” Regulations

If you have enough regulations you destroy all respect for the law.

Winston Churchill
Today’s Agenda

- Overview of Applicable Laws
  - The state and federal laws that regulate waters and wetlands
  - Your activities that are regulated
Today’s Agenda

- Current Trends: Increasing Regulation by expansive definition of jurisdictional areas:
  - Expanding federal regulation of “waters of the United States”
  - Expanding state regulation of “waters of the state”
  - Expanding state regulation of “bed and bank and channel”
State and Federal Laws

- Federal Clean Water Act (33 U.S.C. §§ 1251 et. seq.)
- Porter Cologne Water Quality Control Act (Cal. Water Code §§ 13000 et. seq.)
- Cal. Fish & Game Code (§§ 1600 et. seq.)
- CEQA
Federal Clean Water Act
Federal Clean Water Act

- § 404 regulates discharges of fill by public or private developers to “waters of the US”
- Permits issued by the U.S. Army Corps of Engineers, with oversight from EPA
Why Section 404 Permits Matter

- 16,000 jobs per $1 billion residential development (Sunding 2011)
- 18,000 jobs per $1 billion commercial, office, highway, water infrastructure, industrial etc. (Sunding 2011)
Why Section 404 Permits Matter

- Average applicant for an individual Section 404 permit spends 788 days and $271,596 in completing the process.
- The average applicant for a Nationwide Permit spends 313 days and $28,915 – not counting costs of mitigation or design changes.
Federal Clean Water Act

- §402 regulates discharges of pollutants to “waters of the US” e.g., from public storm drains, construction sites
- Permits issued by Water Boards with oversight from EPA
Federal Clean Water Act

- Regulates and protects Beneficial Uses and quality of “waters of the US”
- §401 Water Quality Certifications, Water Quality standards, §303(d) listings, TMDLs issued by Water Boards under EPA
State Porter-Cologne Water Quality Control Act
Porter-Cologne

- Regulates discharges of fill to “waters of the state”
- Regulates discharges of pollutants to “waters of the state”
- Regulates and protects Beneficial Uses and Water Quality Standards of “waters of the state”
- Water Boards issue Waste Discharge Requirements and administer protections
Cal. Fish and Game Code

- Regulates substantial changes to, or use of any material from the “bed, channel or bank of any river, stream, or lake”
- Regulates deposit or disposal of debris waster or other materials in any location where it may enter any “river, stream or lake”
- Cal. Dept. of Fish and Wildlife issues 1602 Streambed Alteration Agreements
  (Cal. Fish and Game Code §§1600-1616)
CEQA—Substantial Adverse Effect:

- On federally protected wetlands as defined by §404 of the Clean Water Act? (Appendix G)
- On riparian habitat? (Appendix G)
- Through the alteration of the course of a stream or river (Appendix G)
- On riparian lands, wetlands, bays, estuaries, marshes (§15206*-Statewide significance)
CEQA—Like an Overlay

- Requires special consideration of all areas within the jurisdiction of the federal Clean Water Act, Porter Cologne, and Cal. Fish and Game Code
- Requires special consultation with U.S. Army Corps of Engineers, Water Boards, and Cal. Dept. of Fish and Wildlife
CEQA—Consult with & Consider

- comments of “responsible agencies” with jurisdiction to issue discretionary permits or approvals
- Comments of “trustee agencies” with jurisdiction by law over natural resources
- Cal. Dept. of Fish and Wildlife, Cal. Water Boards
  (§§ 21069, 21070, 21104, 21153; 15096, 15129, 15205, 15209, 1538, 15386, 15088)
Trend: More Regulation
Expansion of Federal Regulation

- After receiving over 1 million comments on prior draft rules, on May 27, 2015, the Corps and EPA adopt the “Clean Water Rule”
- Agencies contend the new definition “clarifies,” but does not expand the meaning of “waters of the United States” or their jurisdiction
- Effective date specified: Aug. 28, 2015
Expansion of Federal Regulation

- Rules is highly controversial and is challenged in court before effective
- U.S. District court stayed the rule in 13 States on Aug. 27, 2015
- 6th Circuit Court of Appeals stayed the rule in all 50 states on Oct. 9, 2015
Congress Joins the Controversy

- Bills in house and senate to defund adoption, defense and implementation of the Rule.
- Yesterday, President vetoed adopted legislation to preclude effectiveness of rule and adoption of a replacement.
Broader Potential Federal Jurisdiction

Credit: Ag Alert Newspaper, California, Sept. 2, 2015

Nossaman LLP
Impact of Stayed Federal Rule

- Why do we care what the Rule say when courts have blocked it from being effective?
- California practice is to use a lot of Preliminary Jurisdictional Delineations instead of Approved Jurisdictional Delineations to reduce permitting delay
- PJDs assume broader jurisdiction akin to that established by the rule
Handful of Waters Not Jurisdictional

Waste Treatment Wetlands and Lagoons Constructed in Dry Lands

Storm water Treatment Ponds Constructed in Dry Lands
Not Jurisdictional

Recycled Water Percolation and Recharge Ponds
# Broader Jurisdiction Per Se or By Rule

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<thead>
<tr>
<th>Subject</th>
<th>Prior Law</th>
<th>Final Rule</th>
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<tbody>
<tr>
<td>Waters in interstate commerce</td>
<td>Jurisdictional</td>
<td>Roughly the Same</td>
</tr>
<tr>
<td>Interstate Waters</td>
<td>Jurisdictional</td>
<td>Roughly the Same, though no need to show navigability in fact for certain types of features.</td>
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<tr>
<td>Territorial Seas</td>
<td>Jurisdictional</td>
<td>Same</td>
</tr>
<tr>
<td>Tributaries to Above Waters</td>
<td>Did not define tributary, but if no direct flow to interstate water, territorial sea or water in interstate commerce, then opportunity to submit analysis of no significant nexus.</td>
<td>Tributaries are jurisdictional by rule. A tributary is a water feature contributing flow to interstate waters, territorial seas, or waters in interstate commerce. Generally has an OHWM and bed and bank, but bed, banks and OHWM can be interrupted by natural, manmade, jurisdictional or non-jurisdictional features or an impoundment, as long as there is an OHWM somewhere before the break. No opportunity to show no significant nexus.</td>
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<td><strong>Adjacent Wetlands/Waters</strong></td>
<td>Included only wetlands adjacent to and in some way connected to waters in interstate commerce, interstate waters, territorial seas, impoundments or tributaries.</td>
<td>Includes all types of features, not just wetlands. Not just abutting, but either (i) within 100 feet of; or (ii) within the 100-year floodplain and 1,500 feet of the high tide mark or OHWM of waters in interstate commerce, interstate waters, territorial seas, impoundments, or tributaries. Can be separated by non-jurisdictional and/or constructed or natural upland areas. No opportunity to show no nexus.</td>
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<tr>
<td><strong>Impoundment</strong></td>
<td>Not defined, but generally a water in interstate commerce itself, or the impoundment of a water in interstate commerce, an interstate water, or territorial sea.</td>
<td>Impoundments of a water in interstate commerce, an interstate water, a territorial sea, a tributary, or another type of adjacent water.</td>
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## Broader Jurisdiction Case-by-Case

| Isolated or “Other” Waters | Included all other waters where there a significant nexus to waters in interstate commerce, interstate waters, territorial seas. | No case-specific nexus demonstration required for certain types of “other waters.” Presumption of jurisdiction applies to categories of “other waters,” including prairie potholes, and western vernal pools in California. When analyzing nexus for other waters, must make jurisdictional determination considering together: (i) all features within the 100-year floodplain of water in interstate commerce, interstate water, or a territorial sea; and (ii) all features within 4,000 feet of high tide line or OHWM of water in interstate commerce, an interstate water, a territorial sea, a tributary or an impoundment. Significant must only be “more than insubstantial.” |
Proposed State Riparian Regs

- Process of Water Boards adopting new regulatory and permitting policy for discharges to “waters of the state” began in 2001 in response to SWANCC
- Scope of Effort 2001 to 2008: limited to filling the regulatory “gap”
Proposed State Riparian Regs

- 2008 and January 2013 Drafts of Regs redefine “waters of the state” much more broadly than Clean Water Act
- Regulations and mandate to obtain permits for discharges not limited to “gap” aquatic features.
Proposed State Riparian Regs

- Easier to meet wetlands test:
  - Only occasionally saturated, and for shorter duration than required by feds;
  - Only upper substrate of soils must be saturated (anaerobic); and
  - May lack vegetation or have hydrophytic vegetation

- “Waters of the state” encompass floodplains and adjacent uplands
Proposed State Riparian Regs
Proposed State Riparian Regs

- Permits duplicate, but more difficult to obtain than federal permits:
  - 404(b)(1) alternatives analysis to determine to permit discharges to any water of the state
  - Mitigation hierarchy is the opposite of the federal hierarchy
  - No net loss of aquatic features within watershed
  - Minimum 1:1 buffers and stream length replacements, plus mitigation for impacts
New Streambed Alteration Policy

- Review of Stream Processes and Forms in Dryland Watersheds (Dryland Watershed Report 2010)
  - In arid areas of the state (defined to include Orange County) “streams” subject to jurisdiction do not need to exhibit bed bank or channel, but may be defined by topography
New Streambed Alteration Policy

  - CDFW’s jurisdiction is not limited to the boundaries of streams, channels, lakes and related aquatic and riparian habitat.
  - CDFW’s jurisdiction can include any area that historically may have had identifiable flow since “circa 1800.”
New Streambed Alteration Policy
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New Streambed Alteration Policy

- “Underground regulation” without notice, comment or other procedural protections mandated by the Admin. Procedures Act
- Inconsistent with statute, which authorizes jurisdiction only over bed, bank and channel of streams, lakes and rivers and related fish and wildlife resources
New Streambed Alteration Policy

- Inconsistent with case law and prior Attorney General opinion
- Inconsistent with Fish and Game Commission regulations [14 CCR §§1.72 and 790] defining “streams”
- Enforcement threatened for failure to get permits for alterations in areas based on Drylands Report and MESA field guide
Questions??

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