

**Presentation:** "Overview of CWA Section 404 Regulatory Program"

**Speakers:** Mr. Ed Wylie, USACE, San Francisco, and Mr. Hugh Barroll, Attorney, Office of Regional Counsel, EPA Region 9

**Handout:** None

**Notes:** Mr. Wylie and Mr. Barroll presented an overview of CWA 404 regulatory programs, national water permits, wetlands, and recent changes in the CWA (SWANCC Decision)

**Discussion:**

Regarding	Questions/Remarks	Response (from Mr. Barroll)
	Does the term "navigable waters" come into play with the Solid Waste Agency of Northern Cook County (SWANCC) decision?	<p>Yes and no. The CWA was written to regulate navigable waters, which then came to mean waters of the U.S. that required defining by EPA and USACE.</p> <p>The CWA regulations were written and then reviewed to see if they said what was meant. The bottom line is that true navigability, the ability to float a boat on something, is what everyone agrees and knows Congress had in mind. The question is how much further did Congress intend to go beyond purely navigable waters. That's where there's plenty of room for litigation. In the western United States, until the Supreme Court tells us otherwise, we believe that the CWA applies not only to what you can float boats on, but also to all the tributary systems for those navigable waters, including the adjacent plains. The Supreme Court spoke with sufficient opacity that this position is not the position of other courts, and at some point in the not too distant future, the Supreme Court will have to revisit its decision. We start with navigable waters, and we fight over everything else. That's the short answer.</p>

Regarding	Questions/Remarks	Response (from Mr. Barroll)
	Is a permit needed to dredge?	<p>Mr. Barroll replied that a Section 404 permit is not required to dredge. However, in California, the Regional Board requires a State permit before dredging can proceed. But the Section 404 process only applies when there will be a discharge of dredge materials.</p> <p>Also, removing waste from a wetland does not require a permit. But generally speaking, a couple things come into play. Executive Order 11990 provides for wetland resource protection, which is broader reaching. If the wetland will be filled, a permit would generally be required. However, it depends on the specific situation.</p>
Artificially-created waters	We have a groundwater treatment program that will likely continue for about 30-50 years. We are considering creating a lake with the treated water. Would Section 404 apply to this artificial lake?	<p>If the area in which you are creating a lake has regulated water in it, then Section 404 may apply. If the lake will be created in an upland area, then Section 404 probably does not apply. Once the lake is created, it may become a water of the U.S. and subject to regulation if you want to destroy it later by filling it in.</p> <p>This situation is not clear. In general, artificially created waters can be waters of the U.S. It would be a good idea to discuss this issue with USACE before proceeding with the project.</p>

**Part 2 -**

**Handout:** None

**Notes from presentation by Mr. Wylie:**

The USACE in California is divided into three districts: Sacramento, San Francisco, and Los Angeles Districts. The regulatory jurisdiction for USACE includes tidal and fresh

waters and wetlands. There are two types of permits under Section 404, standard/individual and general.

The role of USACE is to advocate for the public good and not to be a proponent of any project. USACE solicits input from many entities and makes decisions in the interest of the general public.

**Discussion:**

Regarding	Questions/Remarks	Response (from Mr. Wylie)
Evaluation process	Is a permit required to build a dock from private property onto U.S. waters?	Mr. Wylie replied that a permit is required. The Government wants to be involved in property issues at the edge of the government’s property.
	What is the average time from application to issuance of a permit?	<p>The time frame varies and depends on whether endangered species are present at the proposed site.</p> <p>From the time an application is received and reviewed as complete, the only time limits that must be met are those for public notice and comment (15 days minimum for each).</p> <p>Mr. Barroll mentioned that mitigation banking will become more predominant. When impacts from a project cannot be avoided, then mitigation measures are required. But mitigation efforts of others don’t always work for reasons not addressed here.</p> <p>Mitigation credits can be sold to provide funding for large-scale projects.</p>
	How do we determine if projects have been through the permitting process?	Mr. Wylie replied that you can contact EPA or USACE.
	What is the status of drafted legislation from Barbara Boxer, et al?	Mr. Wylie replied that he was not familiar with the status of this drafted legislation and would need to confer with attorneys.

**Part 3 – Key Issues, Mr. Barroll, EPA**

**Handout:** None

**Notes:**

Of the two permit options (nationwide or regional), Mr. Barroll recommends aiming for the nationwide permit for environmental protection; it's a smoother process and it's usually the best way of protecting the environment.

The SWANCC decision pertains to CWA jurisdiction over isolated, non-navigable, intrastate waters used as habitat for migratory birds. The Supreme Court held that the USACE exceeded its statutory authority by asserting CWA jurisdiction over an abandoned sand and gravel pit in northern Illinois that provided habitat for migratory birds. The Court's holding was strictly limited to waters that are non-navigable, isolated and intrastate. This ruling affects some of the regulatory definitions of "waters of the United States," specifically waters covered solely by subsection (a)(3) that could affect interstate commerce solely by virtue of their use as habitat by migratory birds are not longer considered waters of the United States. The Court's opinion did not specifically address what other connections with interstate commerce might support the assertion of CWA jurisdiction over non-navigable, isolated, intrastate waters. A task force is being developed to interpret the Court's decision.

The website for the San Francisco District of the USACE can be found at <http://www.spn.usace.army.mil/regulatory/>.

**Discussion:**

<b>Regarding</b>	<b>Questions/Remarks</b>	<b>Response (from Mr. Barroll)</b>
Vernal pools	What is the current jurisdictional decision for managing vernal pools?	Many vernal pools in California are no longer regulated under federal law. They may be regulated under the Porter Cologne Act by the State, so it is important to coordinate with the Regional Board. However, many vernal pools have a hydrologic connection to other vernal pools or to intermittent streams or wetlands that connect to navigable waters, such as the San Francisco Bay or the Pacific Ocean. We still claim these vernal pools as wetlands, adjacent to the tributary system, which is the basis for maintaining regulatory jurisdiction over many but not all vernal pools. Decisions are made on a case-by-case basis, and it is important to maintain discussions with USACE. I will remind you that vernal pools are wetlands, and therefore, under the executive order for the protection of wetlands, you have an independent responsibility to protect vernal pools. The executive order is still in effect.
Mining industry	Will the task force paper be taken to Supreme Court to ask if they got it right?	A policy statement would first be issued and then proposals for new regulations and/or proposals for further legislation.