Wetland Mitigation in NW Ohio

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Federal and state regulations

- Section 404 of Clean Water Act
- Section 10 of Rivers and Harbors Act
- Section 401 of Clean Water Act and ORC 6111 (Ohio Isolated Wetland Law + Water Pollution Control Law)
Waters of the US

CORPS OF ENGINEERS REGULATORY JURISDICTION

Tidal Waters

Section 404
Section 10
High Tide Line
Mean High Water
Ground Water Line

Section 404
Section 10 (if navigable)
Ordinary High Water

Fresh Waters

Uplands

Fresh Water Wetlands
Marshes, swamps, bogs, & similar areas

Coastal Wetlands
Vegetation associated with salt & brackish water

Section 103
Ocean Disposal of Dredged Material
Typical examples of regulated activities

Section 404
Discharge of Dredged or Fill Material (all waters of the U.S.)
All filling activities, utility lines, outfall structures, road crossings, beach nourishment, riprap, jetties, some excavation activities, etc.

Section 10
All Structures and Work (navigable waters)
Dredging, marinas, piers, wharves, floats, intake / outtake pipes, piling, bulkheads, ramps, fills, overhead transmission lines, etc.

Hydrologically Isolated

Waters of the
Waters of the U.S.

- Current state of jurisdictional affairs:
  - USACE conducts fact-specific analysis and will assert jurisdiction over every water body that is not a relatively permanent water if it has a significant nexus (Kennedy’s Rapanos concurring opinion) with a Traditional Navigable Water...
  - This results in nearly all streams and most wetlands (unless they are clearly isolated) being federally jurisdictional

*Presidential Executive Order on Waters of the United States Rule (Feb. 28, 2017):*
“...the Administrator and the Assistant Secretary shall consider interpreting the term “navigable waters”...in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos...”
Federal and state regulations

- Temporary or permanent impacts to wetlands and streams (e.g. fill, culverting) requires a permit
- Level of permitting, cost, and permit time frame dependent on the acreage and length of impacts
- Corps: Nationwide permit vs. individual permit
- OEPA: Level 1, 2, or 3 isolated permit, 401 Water Quality Certification

Unauthorized fill...whoops!
Many people believe that they can obtain a 404/401 permit to fill any amount of wetland, as long as they agree to mitigate the impact.

THIS IS NOT TRUE
There are substantial hurdles that must be cleared before the USACE can issue a permit under Section 404 of the Clean Water Act:

1. No feasible and prudent alternative
2. Avoidance of Impacts to Waters of the US
3. Minimization of Impacts to Waters of the US
4. Acceptable mitigation of unavoidable impacts to Waters of the U.S.
Mitigation requirements

- OEPA permits = always require mitigation (401 WQC, Isolated)
- NWPs = >0.10 acre wetland, no specific threshold on streams (~100 LF, 150 LF?)
- Wetland mitigation ratios presented in OAC 3745-1-54
- Mitigation bank credits, in-lieu fee credits, permittee-responsible mitigation projects
Mitigation

- Mitigation hierarchy (33 CFR 332)
  1. Mitigation bank credits
  2. In-lieu fee credits
  3. Permittee-responsible (in-kind)

- Corps considerations:
  - Likelihood for ecological success and sustainability
  - Location of compensatory mitigation relative to impact site and their significance in watershed
  - Costs of mitigation project
Mitigation providers and costs for NW Ohio:

- **Pearson Wetland Mitigation Bank**
  - Wetlands: $36,000 per credit

- In-lieu fee Program for all 8-digit HUCS in NW Ohio
  - Wetlands: $48,000 - $58,000 /credit
  - Streams: $215 - $380 /credit

- **North Coast Regional Council of Park Districts**
  - Reuthinger Preserve, Wood Co. is in progress
Requirements for on-site, permittee-responsible mitigation

- Applicant must design, gain approval for, construct, monitor (5 to 10 years), and manage site
- Mitigation area must be preserved in perpetuity
- Permit applicant assumes ultimate responsibility for success or failure of the site
Questions/Comments?