

Pending Changes to Federal Regulation of Coastal Marine Permitting



Presented by

• Al Malefatto

Lewis, Longman & Walker, P.A.

Corps Enabling Legislation



Section 10 of the Rivers and Harbors Act of 1899

prohibits the unauthorized obstruction or alteration of any navigable water of the United States unless you receive a permit from the Army Corps of Engineers

- Marine facilities built within navigable waters are subject to this regulation and require permitting.

Enabling Legislation



Section 404 of the Clean Water Act

- Authority to issue 404 permits is delegated by the US Environmental Protection Agency to the Secretary of the Army, acting through the Chief of Engineers.
- A Corps permit is required whether the work is permanent or temporary. Examples of temporary discharges include dewatering of dredged material prior to final disposal, and temporary fills for access roadways, cofferdams, storage and work areas.

Navigable Waters of the United States



- Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

The term includes coastal and inland waters, lakes, rivers and streams that are navigable and the territorial seas.

Examples: Atlantic Intercoastal Waterway, Atlantic Ocean, St. John's River, Lake Okeechobee

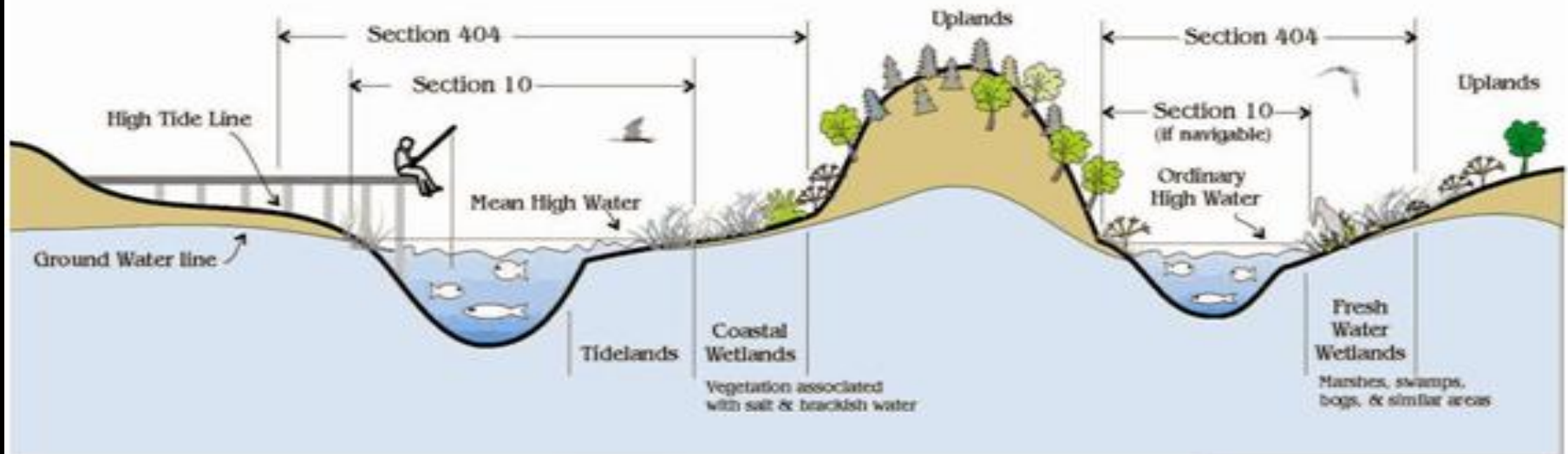
For the visual learners-

<http://www.sas.usace.army.mil/Missions/Regulatory/JurisdictionalDetermination.aspx>

CORPS OF ENGINEERS REGULATORY JURISDICTION

Tidal Waters

Fresh Waters



Typical examples
of regulated activities

Section 103
Ocean Disposal
of Dredged Material

Ocean discharges of
dredged material

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,
pillings, bulkheads, ramps, fills,
overhead transmission lines, etc.

Noteworthy Case Law



- *Rapanos v. United States*, 547 U.S 715

The US Supreme Court clarified that the term "waters of the United States" "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes.'" But, because no single *Rapanos* opinion garnered a majority of the justices' votes, it is unclear which opinion sets forth the controlling test for wetlands jurisdiction.

Proposed Rulemaking- Waters of the US definition



- In April 2014, the EPA issued a proposed rule changing the definition of “waters of the United States”
- Proposed rule seeks to clarify the confusion created by *Rapanos* other cases
- Highly controversial
 - Industry groups and local governments concerned about scope of proposed rule
- Public comment deadline was extended to October 20, 2014.
- *American Water Works Association* – September 2014 article by Lewis Longman and Walker (not yet published)

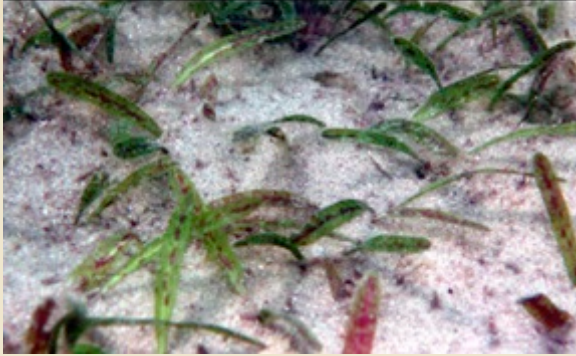
Consultations with the Services



- Section 7- The ESA is administered by two Federal agencies, The United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS).
 - USFWS is primarily responsible for terrestrial and freshwater species
 - NMFS is primarily responsible for marine wildlife and anadromous fish
- Section 7(a)(2) requires that actions authorized, funded or carried out by a Federal agency, that agency shall, in consultation with USFWS and NMFS, ensure that the action is not likely to jeopardize the continued existence of any endangered or threatened species.
- This consultation period is often what causes time consuming delays in the issuance of a 404 permit.

Species of Concern which often result in Consultation (in Florida):

Johnson's Grass - *Halophila johnsonii*



http://www.pbcgov.com/erm/lakes/estuarine/lake-worth-lagoon/_images/jpg/Seagrass4.jpg

- Manatees
- Sea Turtles
- Sawfish
- Shorebirds
- *Halophila Johnsonii*
(Johnson's Sea Grass)



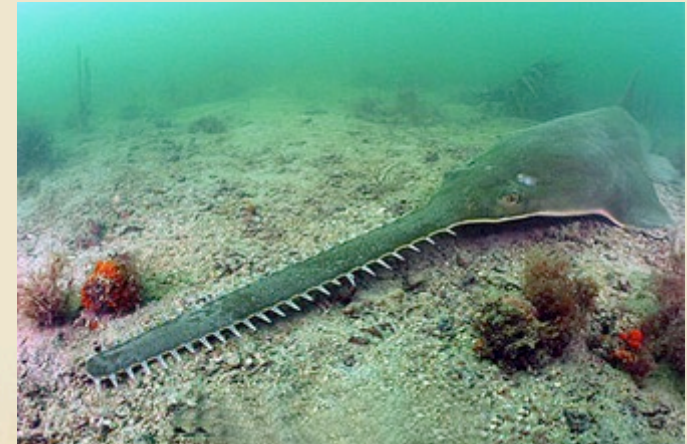
<http://s.ngm.com/2013/04/manatees/img/florida-manatee-kings-bay-615.jpg>



<http://www.seaturtles.org/img/original/GRN-honuAnitaWintner.jpg>



Andy Wraithmell FWC http://floridabirdingtrail.com/index.php/conservation/bird/piping_plover



<http://www.flmnh.ufl.edu/fish/education/questions/sawfish1.jpg>

Proposed Rule: Designation of Critical Habitat

On May 12, 2014 U.S. Fish and Wildlife Service and National Marine Fisheries Service, collectively known as the “Services” jointly issued two proposed regulations and a draft policy concerning the designation of critical habitat under the Endangered Species Act.



<http://www.seaturtles.org/img/original/GRN-honuAnitaWintner.jpg>

Regulatory Change- Definition



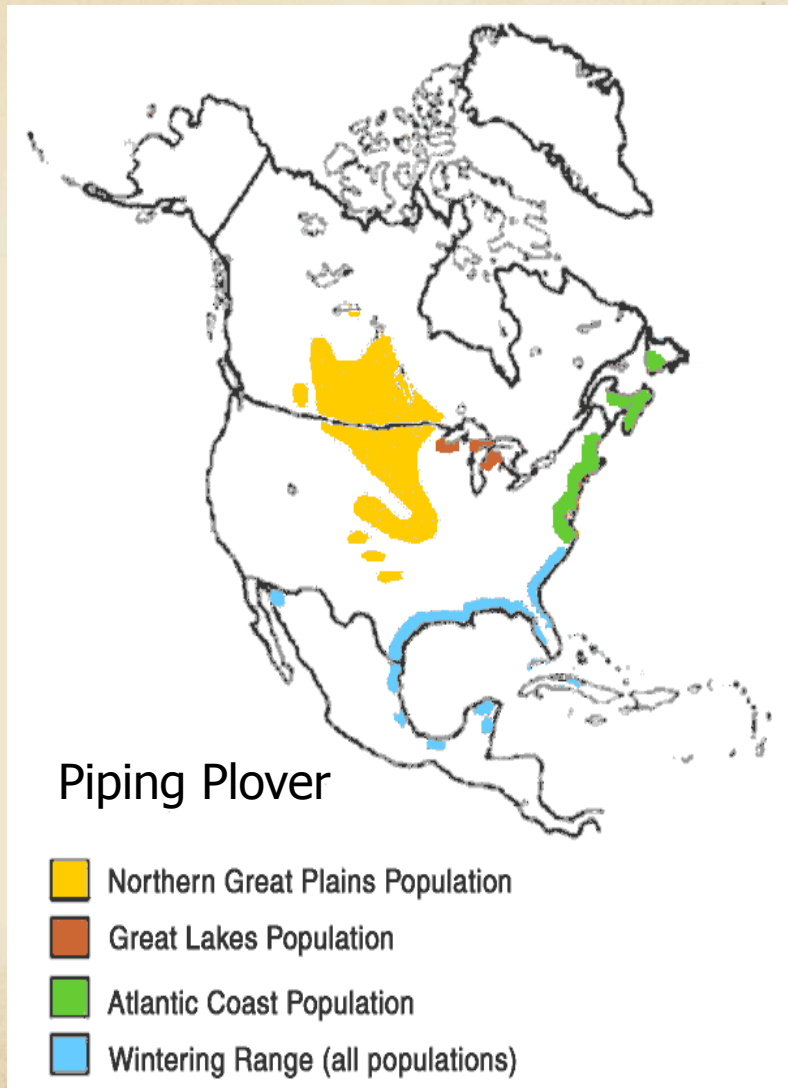
- “Destruction or adverse modification” of critical habitat is “a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.”
- To determine “appreciably diminish” Services are to look at whether the effects are “noticeable” rather than “significant”

Noteworthy Case Law



- Two federal appellate courts have found the 1986 regulatory definition of “destruction or adverse modification” violated the ESA and did not afford sufficient protection to critical habitat.
 - *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001)
 - *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004)
 - Issue of survival of species concerns only
 - Failing to consider recovery of species

Regulatory Change- Critical Habitat Designation Process



- Services proposed rule will define the previously undefined term “geographical area occupied by the species”
 - Areas used throughout all or part of life cycle
 - Areas not used regularly
 - Delineated by occurrence, as determined by the Secretary
- Deletes “primary constituent element”

Noteworthy Case Law



- Courts have held that “primary constituent elements” must be “found” in an area prior to designation as critical habitat.
- Intention is the Service could not designate critical habitat on a “mere hope” that a “primary constituent element” for a species will be found on a piece of property in the future.
 - *Cape Hatteras Access Pres. Alliance v. Dep’t of Interior*, 344 F. Supp. 2d 108, 1022 (D.C. Cir. 2004)

Policy- Exclusions from Critical Habitat: Section 4(b)(2)



- Intended to complement the two proposed rules and provide for a simplified exclusion process
- Establishes limitations on the exclusion of lands subject to voluntary conservation measures
- Establishes a presumption against exclusion of federal lands
- Emphasizes the exclusions are both entirely matters of agency discretion and “rare”

Comparison

Jeopardy

- Continue to apply to actions that present a likelihood of extinction of the species

Adverse Modification of Critical Habitat

- Prohibited act
- Becoming more stringent in some cases
- Applies to federal actions that adversely affect potential recovery, even if survival is not diminished

Noteworthy Case Law



- *Mingo Logan Coal Company v. EPA*, 714 F.3d 608

The D.C. Circuit ruled that the EPA has the power under the CWA to retroactively veto a section 404 dredge and fill permit “whenever” it makes a determination about certain adverse effects, even years after the Corps has granted a permit to the applicant. This decision reverses the D.C. Federal Court opinion limiting the EPA’s section 404(c) veto authority

- The US Supreme Court denied cert. on March 24, 2014 leaving the decision by the D.C. Circuit valid

Noteworthy Case Law



- *Koontz v. St. John's River Water Management District*, 568 U.S. _____, 133 S. Ct. 2586 (decided June 25, 2013)

The US Supreme Court held that land-use agencies imposing conditions on the issuance of development permits must comply with the “nexus” and “rough proportionality” standards of Nolan/Dolan cases, even if the condition consists of a requirement to pay money and even when the permit is denied.

Noteworthy Case Law



- *Friends of Animals v. Ashe*, No. 13-1607 (D.C. Circuit June 23, 2014)

U.S. District Court for the D.C. Circuit affirmed strict application of the ESA pre-litigation notice requirements by dismissing a lawsuit alleging USFWS failed to timely act on listing petitions .

Critical Habitat Implications and Take Aways



- The two proposed critical habitat rules will create a clear distinction between:
 - Prohibited federal actions that create jeopardy
 - Adverse modification of critical habitat
- If adopted, regulatory changes would raise bar for ESA compliance for activities occurring within designated critical habitat
- Much of Florida's shoreline is likely to be designated as Critical Habitat
 - More likely to require formal consultations
 - More mitigation likely

Proposed Waters Definition Implications and Take Aways



- Concerns that there may be expanding Army Corps Jurisdiction and Permitting
- Confusion over what “other waters” may or may not entail
- Larger implications in more arid western states

That's All Folks...
Enjoy the rest of your time in Marco Island!