

# Behind Closed Doors: The Quiet Expansion of the Wetlands Landscape

*The federal definition of “wetlands” and the changing policy conditions for regulating wetlands is evolving and expanding.*

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When the government first grouped landscape units, such as “marshes,” “swamps,” and “bogs,” under the single-term “wetlands,” it acknowledged that there was “no single, correct, indisputable, ecologically sound definition for wetlands.”<sup>1</sup> Rather, there was a difference between those scientifically well-known terms, such as “marshes,” “swamps,” and “bogs,” and the less-definable transitional lands that were to be classified as wetlands.<sup>2</sup> This does not mean that many of the things we have come to call wetlands are not valuable from an ecological perspective. But it does mean that policy and regulatory determinations have had as much to do with what areas are considered to be wetlands as any scientific understanding of the term.

In fact, the agencies’ definition of “wetland” has proved malleable, depending on their interpretation of law and policy, which has changed over the years, moving farther and farther away from surface waters, up the hill towards drier and drier areas, all of which are now regarded as wetlands. There has been a long-standing controversy over the legitimacy of methods of identifying wetlands, dating back to the U.S. Army Corps of Engineers’ (Corps) adoption of the 1987 Wetlands Delineation Manual (1987 Manual).<sup>3</sup>

Federal agencies must follow the procedural requirements of the Administrative Procedure Act (APA),<sup>5</sup> including public notice-and-comment rulemaking, when they adopt binding pronouncements or amend pre-existing rules. The APA defines a “rule” in part as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”<sup>4</sup> When the agencies define what areas will qualify as wetlands, as they did by adopting regional supplements to the 1987 Manual, or identify plant species that will satisfy the hydrophytic vegetation parameter, which the agencies did through updates to the National Wetland Plant List (NWPL),<sup>6</sup> they are by all appearances adopting agency statements designed to “implement, interpret, or prescribe law or policy” subject to the procedural requirements of the APA. But the agencies take the position that “lists,” “manuals,” and “regional supplements” are not rules. Thus, the Corps and the U.S. Environmental Protection Agency (EPA) have strategically expanded the scope of what they consider to be “wetlands” without following the notice-and-comment rulemaking procedures estab-

lished by the APA. The latest example of this strategy is the 2012 NWPL, which, by expanding the number of plants considered to be hydrophytic, has the effect of again moving the boundaries of what the agencies consider to be wetlands outwards and upwards. This expansion of what a wetland is for purposes of the CWA has occurred without any change in the law or the regulations, and without any public notice-and-comment rulemaking.

Under the 1987 Manual, an area will qualify as a wetland if it satisfies three parameters: evidence of hydrology; hydric soils; and hydrophytic vegetation. For the vegetative analysis, the 1987 Manual establishes five “indicator status” categories, indicating the likelihood that a plant species will grow in wetlands or uplands.<sup>7</sup> The presence of hydrophytic plants is often determinative of whether an area will be a wetland because, if hydrophytic plants are present, the requisite hydric soils and hydrology will most likely be present. The agencies’ adoption of the 1987 Manual was controversial and, because the agencies took the position that the Manual was not a rule, they did not provide public notice or comment under the APA.

In January 1989, the agencies went a step further and adopted a Federal Manual for Identifying and Delineating Jurisdictional Wetlands (the 1989 Manual), which provided mandatory technical criteria, field indicators, and determination methods for identifying wetlands and tracing their upper boundaries. The 1989 Manual expanded the scope of areas considered to be wetlands, and, once again, was adopted without APA notice-and-comment rulemaking. Following public outcry, in 1991 Congress interceded and directed the Corps to cease identifying or delineating any land as a “water of the United States” under the 1989 Manual or adopting “any subsequent manual [without following] the requirements for notice and public comment of the rule-making process of the [APA].”<sup>8</sup>

The agencies thus resumed using the 1987 Manual. However, the agencies have sidestepped the congressional directive to follow the “requirements for notice and public comment” of the APA when modifying the Manual by adopting a series of “regional supplements” to the 1987 Manual. The regional supplements have redefined the landscape of what is considered a wetland, but have been issued without public notice-and-comment rulemaking.

Under the Arid West Regional Supplement, for example, many areas in the arid West are newly defined as wetlands, effectively reinstating portions of the 1989 Manual.<sup>9</sup> The Arid West Regional Supplement adopts a wetland hydrology “standard” that alters the 1987 Manual by referencing a Corps technical publication that maintains that a water table

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12 inches below the soil's surface during the growing season for 14 days every 730 days is adequate to conclude that wetland hydrology is present. An area that meets this hydrologic standard and contains hydric soils and hydrophytic vegetation is a wetland in the arid West.

In 2012, the Corps once again expanded the boundaries of what it defines to be a wetland by updating the 1988 NWPL.<sup>10</sup> Because the presence of hydrophytic plants is oftentimes determinative of whether the other two wetland parameters will exist, wetland delineations often focus on plant species. Thus, the changes made in the 2012 NWPL are significant. In the 2012 NWPL, the Corps changed the indicator status for 12% of the plant species, adopted new qualitative definitions for plant categories,<sup>11</sup> added 70 new plant species, and dropped the plus and minus modifiers that previously qualified the five indicator designations.<sup>12</sup> The new list also divides the country into different regions and does not make uniform changes to species classifications across those regions. Thus, areas with identical vegetation along a boundary line may be classified as wetland species on one side of the line and upland species on the other.<sup>13</sup>

The Corps has suggested that the 2012 NWPL changes little.<sup>14</sup> But it made hundreds of changes qualifying more plant species as hydrophytic.<sup>15</sup> For example, the 2012 NWPL categorizes Japanese honeysuckle (*Lonicera japonica*), which is extremely prevalent in the eastern United States, as a wetland species in the Atlantic and Gulf Coastal Plain region.<sup>16</sup> Any area containing honeysuckle in those regions is now likely to satisfy the vegetative parameter and may qualify as a wetland. With more areas qualifying as wetlands, there are likely to be greater and more expansive assertions of Clean Water Act jurisdiction.

The process through which the Corps revised the plant list has led to classifications, such as that for the Japanese honeysuckle, which do not rely on quantifiable data, such as existing data sheets from past wetland delineations, and instead rely on an algorithm that ignores real data and public input. The majority of the update process was undertaken by national and regional panels comprised of botanists from four federal agencies—the Corps, EPA, the FWS, and the NRCS. External botanists from museums and universities were contracted to participate in the update, but had a very limited role.<sup>17</sup> Private-sector consultants, many of whom make jurisdictional determinations on a day-to-day basis and have far more field experience than academics and government employees, were not included on the panels.

The Corps published a draft plant list in the Federal Register and received 377 comments, approximately 50% of which were from the private sector. But the regional panels reviewing those comments did not adopt over 95% of the substantive comments.<sup>18</sup> And the Corps did not follow the notice-and-comment rulemaking provisions of the APA when it finalized the 2012 NWPL.

The Corps' evolving view of what it regards to be a "wetland" is a one-way ratchet—resulting in more areas that qualify as wetlands, not less. Congress directed the agencies in 1991 not to change the 1987 Manual without going through notice-and-com-

ment rulemaking. But through regional supplements and lists, the Corps has substantially expanded the methodologies under which wetlands are delineated without following the APA's public notice-and-comment procedures as directed by Congress.

Expansion of the scope of the wetlands regulatory regime without rulemaking has led to significant opposition by regulated entities and the public and threatens to undermine the legitimacy of the wetlands program. According to EPA, approximately 75% of the nation's wetlands are privately owned.<sup>19</sup> The Obama Administration has expressed its desire to operate in a transparent and open manner. But regulating through guidance, supplements, lists, and manuals thwarts those goals. The public needs to be involved in the rulemaking process as Congress has directed through the APA and the 1991 legislation in order for changes in wetland delineation rules to achieve legitimacy and find public trust and support.

#### ENDNOTES

1. Cowardin et al., "Classification of Wetlands and Deepwater Habitats of the United States," (1987), available at <http://www.npwrc.usgs.gov/resource/wetlands/classwet/wetlands>.
2. *Id.*
3. U.S. ARMY CORPS OF ENGINEERS, TECHNICAL REPORT Y-87-1, CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL (1987), available at [el.erdc.usace.army.mil/wetlands/pdfs/wlman87.pdf](http://el.erdc.usace.army.mil/wetlands/pdfs/wlman87.pdf).
4. 5 U.S.C. §551(4). "Rulemaking" is defined as the agency's process for "formulating, amending, or repealing a rule." *Id.* at §551(5).
5. The APA's various procedural requirements generally include a notice of proposed rulemaking published in the Federal Register and an opportunity for interested persons to submit written data, views, or arguments. 5 U.S.C. §553(b)-(c). An agency is required to consider the comments it receives and publish a final rule together with a statement of basis and purpose explaining the rationale for its decision. *Id.* at §553(c). A rule is subject to judicial review.
6. In May 2012, the Corps, EPA, the U.S. Fish and Wildlife Service, and the Natural Resources Conservation Service published notice of the 2012 NWPL. Publication of Final National Wetland Plant List, 77 Fed. Reg. 27210 (May 9, 2012).
7. The five categories are: Obligate wetland (OBL), which almost always occur in wetlands; Facultative Wetland (FACW), which usually occur in wetlands; Facultative (FAC), which are equally likely to occur in wetlands and uplands; Facultative Upland (FACU), which usually occur in uplands; and Obligate Upland (UPL), which almost always occur in uplands. If more than 50 percent of the dominant species in an area are OBL, FACW, or FAC, the area will satisfy the hydrophytic vegetation parameter. See 1987 Manual at 17-18.
8. Pub. L. No. 102-104, 105 Stat. 510, 518 (1991), available at <http://www.gpo.gov/fdsys/pkg/STATUTE-105/pdf/STATUTE-105-Pg510.pdf>.
9. See U.S. ARMY CORPS OF ENGINEERS, ERDC/EL TR-08-28, REGIONAL SUPPLEMENT TO THE CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL: ARID WEST REGION (Version 2.0) (2008), available at [http://www.usace.army.mil/missions/civilworks/regulatoryprogramandpermits/reg\\_supp.aspx](http://www.usace.army.mil/missions/civilworks/regulatoryprogramandpermits/reg_supp.aspx); Robert J. Pierce, Ph.D., Wetland Science Applications, Inc., Review of the Draft Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Supplement) (June 2011), available at <http://www.wetland-training.com/mod/page/view.php?id=16>.
10. U.S. FISH & WILDLIFE SERVICE, NATIONAL LIST OF PLANT SPECIES THAT OCCUR IN WETLANDS: 1988 NATIONAL SUMMARY (1988), available at <http://www.fws.gov/pacific/ecoservices/habcon/pdf/National%20List%20of%20Plant%20Species%201988.pdf>. The FWS had primary responsibility for the NWPL until December 2006 when that responsibility was transferred to the Corps pursuant to a Memorandum of Agreement. National Wetland Plant List, Questions and Answers at Q9 (May 2012), available at <http://lrl-apps.lrl.usace.army>.

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in value because the dune obstructed their view, a buyer would likely also consider the value provided by the dune in shielding the property from destruction. The city should have been permitted to present evidence of nonspeculative, reasonably calculable benefits arising from the dune project, and the jury should have been charged that determination of just compensation required calculation of the fair market value of the owners' property immediately before and after the taking and construction of the dune. These errors require a new trial.

*In re Quantitative Settlement Agreement Coordinated Civil Cases*, No. JCCP 4353 (Super. Ct. Cal. June 4, 2013). A California court validated a settlement agreement and 11 related agreements concerning the conservation, transfer, and exchange of Colorado River water diverted for beneficial consumptive use among Southern California water agencies. The agreements were negotiated and executed to resolve long-standing disputes under federal and state law, court decisions, and contracts governing the diversion and use of Colorado River water by states through which the river runs. Among other provisions, the agreement allows farms in Imperial County to sell water to San Diego for use as drinking water. Environmentalists were concerned about impacts this would have on the Salton Sea, an inland waterbody that has been sustained primarily by irrigation drainage. But the agreements comply with all necessary procedural and substantive requirements, including environmental review requirements under the California Environmental Quality Act.

*Tarrant Regional Water District v. Herrmann*, No. 11-889 (U.S. June 13, 2013). The U.S. Supreme Court held that Oklahoma statutes that favor in-state water appropriation permit applicants over out-of-state permit applicants do not violate the Commerce Clause and are not preempted by the Red River Water Compact—an interstate water compact that allocates water among Arkansas, Louisiana, Oklahoma, and Texas. The case arose after a Texas water district sought permits to appropriate water from Oklahoma for use in Texas. Knowing that Okla-

homa's water agency would likely deny the application because Oklahoma water law effectively prevents out-of-state applicants from taking or diverting water from within Oklahoma's borders, the water district filed suit in federal court simultaneously with its permit application, seeking to enjoin Oklahoma's enforcement of the state statutes. The water district argued that the statutes were preempted by federal law because they prevent Texas from exercising its rights under the compact. But the compact does not create any cross-border rights in signatory states. The water district also argued that the statutes discriminated against interstate commerce in violation of the Commerce Clause by preventing water left unallocated under the compact from being distributed out of state. But the Oklahoma water statutes cannot discriminate against interstate commerce with respect to unallocated waters because the compact leaves no waters unallocated. Sotomayor, J., delivered the opinion for a unanimous Court.

*Alaska Community Action v. U.S. Environmental Protection Agency*, No. 12-1299 (D.D.C. May 7, 2013). A district court dismissed as time barred environmental groups' CWA and APA claims challenging EPA's list of dispersants and other projects that may be used in the event of an oil spill. The groups asserted that the list, called the NCP Product Schedule, fails to specify the waters or quantities in which listed products may be used. But the court ruled that the time for bringing suit has long since passed. In 1984, EPA announced its decision not to specify the waters or quantities in which listed products could be used. EPA's choice not to limit the use of listed products to pre-specified waters and quantities marked the "consummation" of the Agency's decision process and was one from which legal consequences flowed—had EPA chosen to specify waters and quantities on the NCP Product Schedule, the product schedule would look different than it does today, and decisionmakers' flexibility in responding to future oil spills would have been curtailed. Hence, EPA's 1984 decision was a final agency action and subject to suit at that time.

*Endnotes continued from page 23*

- mil/orf/article.asp?id=2889&MyCategory=1 ("NWPL Q&A").
11. NWPL Q&A at Q1, Q11, Q12. The Corps modified the definitions previously used for indicator status categories "to increase clarity and to better describe species occurrences." The 2012 List thus utilizes the five following qualitative definitions: OBL (almost always is a hydrophyte, rarely in uplands); FACW (usually is a hydrophyte but occasionally found in uplands); FAC (commonly occurs as either a hydrophyte or non-hydrophyte); FACU (occasionally is a hydrophyte but usually occurs in uplands); and UPL (rarely is a hydrophyte, almost always in uplands). *Id.*
  12. All plants that were previously assigned plus or minus modifiers under the 1988 NWPL were "automatically merged into their broader indicator category" except those plants assigned FAC-, which were individually reviewed for appropriate categorization. *Id.* at Q11.
  13. See Timothy L. Walters, Ph.D., EnviroScience Inc., Wetland Delineation Update: Application and Effects of the Use of the Regional Supplements to the 1987 Delineation Manual and 2012 National Wetland Plant List (undated) (presentation at CLE International conference) (showing variations in plant classification for several key species that are FACU in Ohio, which is Region 1, and FAC in Michigan, which is Region 3, and therefore, the likelihood of a larger area being defined as a wetland in Michigan than Ohio solely because of the classification of the plant species).
  14. *Supra* note 1.
  15. W. Parker Moore, Army Corps' New Plant List Expected to Increase Number of Wetlands, Assertions of Clean Water Act Jurisdiction, 238 DAIL ENV'T REP. (BNA) B-1 (Dec. 12, 2012). Mr. Moore concluded that "[i]n the Arid West Region, nearly ten times more species were reclassified from upland to wetland statuses than the opposite direction." *Id.*
  16. See Robert J. Pierce, Ph.D., Wetland Science Applications, Inc., "Thoughts on the 2012 Plant List" (May 29, 2012) (according to Dr. Pierce's research and field experience, Japanese honeysuckle should be an upland species).
  17. NWPL Q&A at Q7. The Corps also initiated a contract with the Battelle Memorial Institute to provide an independent peer review of the list, as required by the Information Quality Guidelines. *Id.*
  18. Robert J. Pierce, Ph.D., Wetland Science Applications, Inc., "Thoughts on the 2012 Plant List" (May 29, 2012), at 7 (After reviewing the comments submitted to the Corps on the 2012 NWPL, Dr. Pierce concludes that less than 5% of the substantive comments received were adopted by the regional panels).
  19. Wetlands Protection, U.S. EPA, <http://water.epa.gov/type/wetlands/protection.cfm> (last visited Mar. 17, 2013).