Legal Strategies to Protect Streams, Buffers and River Corridors.

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Vegetated swales are typically found in urban communities or along roadsides where the primary runoff source is stormwater.

<table>
<thead>
<tr>
<th>Pollutant</th>
<th>Median % Removal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total suspended solids</td>
<td>81</td>
</tr>
<tr>
<td>Oxygen demanding substances</td>
<td>67</td>
</tr>
<tr>
<td>Nitrate</td>
<td>38</td>
</tr>
<tr>
<td>Total phosphorus</td>
<td>9</td>
</tr>
<tr>
<td>Hydrocarbons</td>
<td>62</td>
</tr>
<tr>
<td>Cadmium</td>
<td>42</td>
</tr>
<tr>
<td>Copper</td>
<td>51</td>
</tr>
<tr>
<td>Lead</td>
<td>67</td>
</tr>
<tr>
<td>Zinc</td>
<td>71</td>
</tr>
</tbody>
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EPA 832-F-99-006 | Sept. 1999
Stormwater Technology Fact Sheet: Vegetates Swales
Mitchell Brook in Whately, MA, before and after culvert replacement
FOUR LEGAL STRATEGIES

• CLEAN WATER RULE

• NATIONAL FLOOD INSURANCE PROGRAM/ENDANGERED SPECIES ACT

• WATER QUALITY CERTIFICATIONS

• PROPERTY RIGHTS AND WETLANDS PROTECTION
The Clean Water Rule

1. Traditionally navigable waters
   Things appropriate for commercial navigation, but that can include commercial recreational navigation.

2. Interstate waters
   Exactly what you’d think – anything that crosses state lines.

3. The Territorial Seas
   Coastal waters out to 3 miles.

4. Impoundments of waters that are otherwise covered:
   Things like reservoirs behind dams of protected waters.

5. Tributaries to traditional navigable waters, interstate waters and territorial seas
   Contributes flow downstream to these waters and has indications of regular flow, namely bed and banks and ordinary high water mark.

6. Waters adjacent to categories 1-5.
   Adjacent means a water body is:
   - Within 100 feet of the ordinary high water mark of any of above waters;
   - Within the floodplain of any of the above waters, but not beyond 1,500 feet if the floodplain extends more than 1,500 feet; or
   - Within 1,500 feet of the high tide line of a traditionally navigable water or the territorial seas, or the ordinary high water mark of the Great Lakes.
IT'S TIME TO DITCH THE RULE

KNOW THE FACTS:
Proposed Rule to Protect Clean Water
Puddles are not regulated.

WOTUS
DITCH THE MYTH

LET'S GET SERIOUS ABOUT PROTECTING CLEAN WATER

This document addresses concerns and misconceptions about the proposal by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to protect clean water. The proposed rule clarifies protection under the Clean Water Act for streams and wetlands that form the foundation of the nation’s water resources. The following facts emphasize that this proposed rule cuts through red tape to make normal farming practices easier while also ensuring that waters are clean for human health, communities, and the economy. Learn more facts at www.epa.gov/ditchthemyth

MYTH: The rule would regulate all ditches, even those that only flow after rainfall.
TRUTH: The proposed rule actually reduces regulation of ditches because for the first time it would exclude ditches that are constructed through dry lands and don't have water year-round.

MYTH: A permit is needed for walking cows across a wet field or stream.
TRUTH: No. Normal farming and ranching activities don’t need permits under the Clean Water Act, including moving cattle.

MYTH: Ponds on the farm will be regulated.
TRUTH: The proposed rule does not change the exemption for farm ponds that has been in place for decades. It would for the first time specifically exclude stock watering and irrigation ponds constructed in dry lands.

MYTH: Groundwater is regulated by the Clean Water Act.
TRUTH: The proposed rule specifically excludes groundwater.

MYTH: The federal government is going to regulate puddles and water on driveways and playgrounds.
TRUTH: Not remotely true. Such water is never jurisdictional.

MYTH: EPA is gaining power over farms and ranches.
TRUTH: No. All historical exclusions and exemptions for agriculture are preserved.

KNOW THE FACTS:

Proposed Rule to Protect Clean Water

Exclusions and exemptions for agriculture will not change.
NFIP Roles: Federal and State

- **Federal**
  - National program oversight
  - Risk Identification (mapping)
  - Establish development/building standards
  - Provide insurance coverage

- **State**
  - State program oversight
  - Establish development/building standards
  - Provide technical assistance to local communities/agencies
  - Evaluate and document floodplain management activities
NFIP meets ESA

- 2003 - NWF Sued FEMA for failure to comply with ESA in the Puget Sound
- 2004 – Court Ruled that FEMA must consult with NMFS
- 2006 - FEMA provided a Biological Assessment that concluded NFIP may affect but not adversely
- September 2008 - NMFS issued Biological Opinion with Jeopardy/ Adverse Modification
- September 21, 2011 – King County and other local jurisdictions required to comply with BiOp
Key Findings - Context

Comprehensive Approach - King County’s approach to environmental protection and restoration is comprehensive, wherein regulatory protections are complemented by many additional capital and programmatic actions, most of which contribute, either directly or indirectly, to floodplain health and salmon recovery.

Future development precluded or severely limited in many areas - Includes almost all floodplain agricultural lands (~51% of floodplain area) and many other tracts by current use taxation, public benefit rating, transfer of development rights, forest and farmland preservation and open space acquisition programs.

Floodplains benefit from non-floodplain regulations - Regulations upstream from and adjacent to floodplains provide added protections and contribute to floodplain health and restoration potential, including:
  - Over 8,300 riparian acres in aquatic area buffers along Coho-bearing streams alone upstream from floodplains.
  - The non-floodplain area of wetlands at least partially in a mapped floodplain (2,100 acres),
  - Mapped moderate or severe channel migration areas extending beyond a mapped FEMA floodplain (760 acres),
  - Mapped steep slopes (>40%, 6,300 acres), landslide hazard areas (11,800 acres) and erosion hazard areas (18,000 acres) within one-thousand feet of a floodplain, and
  - About 30,000 acres of critical aquifer recharge area (Coho-bearing streams are used for illustration purposes only. They are inclusive of all Chinook-bearing stream reaches and almost all steelhead-bearing stream reaches, except those in relatively steep headwaters.

Flood and Salmon Plans have future benefits not accounted for - The King County Flood Hazard Management Plan and WRIA salmon recovery plans identify many additional floodplain and surrounding watershed habitats likely to be protected and restored in the future but not assessed. Between 2010 and 2016, the County has—or will—implement about 60 CIPs in - or in close proximity to - mapped FEMA floodplains.
Under Section 401(a)(1) of the Clean Water Act (33 USC § 1341), states have the authority to review and approve, condition, waive, or deny water quality certification for any activity that is subject to a Federal permit or license and may result in a discharge to waters of the United States.
• 404 Permit

• EPA 402 permit (MA & NH)

• Section 10 RHA Permit

• FERC License (re-license)

• NRC License
PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994) A State may impose conditions on certifications insofar as necessary to enforce a designated use contained in the State's water quality standard. Petitioners' claim that the State may only impose water quality limitations specifically tied to a "discharge" is contradicted by §401(d)'s reference to an applicant's compliance, which allows a State to impose "other limitations" on a project.

The Property and Proposed Development

- Mr. Koontz owned approximately 15 acres of undeveloped wetlands.

- He desired to develop 3.7 acres and offered to grant a conservation easement over the remaining 11.3 acres to the River District.

- Mr. Koontz applied for a dredge and fill permit with the River District.

- The River District countered with two options: a) reduce the development down to one acre and grant a conservation easement on the remaining 14 acres, or b) pay for the cost of improvements located miles away on land having nothing to do with the planned development.

- Mr. Koontz refused and filed an inverse condemnation action.
“It makes no difference that no property was actually taken in this case. Extortionate demands for property in the land-use permitting context run afoul for the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”

The Supreme Court’s decision last term in Koontz v. St. Johns River Water Management District, is one of the worst, if not the worst decision in the Court’s pantheon of takings cases. The majority opinion conflicts with established doctrine in several respects and contradicts and even misrepresents pertinent precedent. At the same time, the majority does not explain whether or how it thinks established doctrine should be reformed to support its novel rulings. As a result, the Court not only reached a mistaken result in this particular case but has cast a pall of confusion and uncertainty over takings law as a whole, reversing to some extent the recent successful work by the Court to improve upon the coherence and predictability of takings doctrine.
THANKS