



**South Florida Water Management District
Regulatory Peer Review Forum
February 11, 2011
1 p.m. – 2:30 p.m.
SUMMARY**

Attendees:

Gerry Ward
Dan Clark
Paul Whalen
Jay Foy
Craig Kidwell
Patrick Martin
Ken Todd
Alan Wertepny
Joseph G. Walsh
John S. Yeend
Irene Kennedy Quincey
Fred Roth
Rebecca Elliott

Consulting Engineer
Clark & McCarthy
TAC Environmental
Stormwater J Engineering
Consulting Engineer
Lake Worth Drainage District
Palm Beach County
Mock-Roos
Lake Worth Drainage District
John S. Yeend, P.E.
Pavese Law Firm
Schorah & Associates
FDACS/OAWP

Tony Waterhouse
Laurie Donovan
Steve Sarley
Doug MacLaughlin
Laura Corry
Brian Tilles
Anita Bain

SFWMD – Water Resource Regulation Staff
SFWMD – Water Resource Regulation Staff
SFWMD – Water Resource Regulation Staff
SFWMD – Office of Council
SFWMD – Palm Beach Service Center
SFWMD – Water Resource Regulation Staff
SFWMD – Water Resource Regulation Staff

1. Opening Remarks – Tony Waterhouse

Mr. Waterhouse opened the meeting at about 1:05 p.m.

2. Ag Issues

Doug MacLaughlin led the discussion on agricultural (Ag) exemptions and Bill HB 421 in the Florida House of Representatives. Discussion points, including those raised by meeting attendees included the following.

- In order to qualify for an Ag exemption, landowner must be engaged in agricultural practice.

- Having an Ag exemption does not change requirements regarding the protection of water resources.
- Alterations to topography may not be for the sole purpose of diverting surface water flow or adversely impact wetlands.
- An Ag exemption does not relieve the landowner of responsibilities associated with the protection of water resources.
- In the Duda (landowner) vs. the St. Johns Water Management District (SJWMD) case, in which Duda challenged the SJWMD rule on Ag exemptions, the court made a distinction between groundwater and surface water resources.
- The court ruled that the Ag exemption would apply if drainage ditches were intended to control groundwater rather than surface water.
- The court upheld enforcement action by SJWMD because Duda's ditches impacted wetlands.

3. Legislative Issues

Tony Waterhouse (TW) led the discussion on Florida legislative issues. Discussion points, including those raised by meeting attendees included the following.

- Current administration (newly elected governor) wants to streamline the regulation process.
- There may be changes in the duration of conceptual permits issued by the SFWMD.
- These are regulatory issues that will be considered by the SFWMD in the year ahead.

4. General Discussion

- There is a proposal to eliminate the National Flood Insurance Program for federally funded flood insurance.
- When letters of non-compliance have been issued in error, the SFWMD does not rescind the letters and they are available on public record. However, documentation indicating compliance for a given erroneous non-compliance letter is also available on public record, but once a letter has been sent, it cannot be deleted from public record.
- The Audubon Society wants the SFWMD to track different categories of wetland impacts.

5. Next meeting date/other/topics/adjournment

- Next meeting date is April 15, 2011
- Future topics include Google Earth Demonstration
- Meeting adjourned at 2:15pm

AGRICULTURAL EXEMPTION

LEGAL ASPECTS

Relevant Statute - Section 373.406(2), Fla. Stat.

373.406 Exemptions. The following exemptions shall apply:

(2) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.

[Essentially an exemption from having to obtain an Environmental Resource Permit]

Legislative Intent – Agricultural Activities Should Not Adversely Impact Water Resources

Section 373.016, Fla. Stat.

Legislature directs the District to protect all water resources, does not exclude agricultural activities

Section 373.046(4), Fla. Stat.

"Nothing herein rescinds or restricts the authority of the districts to regulate silviculture and agriculture pursuant to Part IV of this chapter or s. 403.927."

Section 403.927(1) and (4), Fla. Stat.

"The Legislature recognizes the great value of farming and forestry to this state and that continued agricultural activity is compatible with wetland protection."

"'Agricultural Activities' include all necessary farming and forestry operations which are normal and customary for the area, ... provided such operations do not impede or divert the flow of surface waters."

Exemptions Are to Be Strictly Construed Against the Person Claiming the Exemption

Case Law to Date

Appellate Cases

Duda I - A. Duda and Sons, Inc., v. St. Johns River Water Management District, 17 So.3d 738 (Fla. 5th DCA 2009)

- Duda challenging SJRWMD rule on ag exemption stating that the ag exemption did not apply if the alteration of topography affecting surface water was "more than incidental." The Court held the rule was invalid because "more than incidentally" obstructing surface water does not mean "solely or predominantly" obstructing surface waters as stated in the statute.
- The Court also indicated that the ag exemption would apply if drainage ditches were dug to control ground water instead of surface water.

Duda II - A. Duda and Sons, Inc., v. SJRWMD, 34 Fla. L. Weekly D2013a (Fla. 5th DCA 2009)

- Court upheld SJRWMD enforcement action against Duda and ruled the ag exemption under 373.406(2) did not apply because the evidence indicated the agriculture operation (ditching) impacted wetlands.

Lower Court Cases

- Circuit Court and Agency Orders are inconsistent in their interpretation of Section 373.406(2) and provide little guidance, especially in light of the recent Duda cases

Present Precedent

- Under the Duda cases, to qualify for the ag exemption one has the burden of showing that:
 1. He is in the occupation of agriculture, and
 2. He is altering the topography for agricultural purposes, and
 3. The predominant effect of the alteration is not impounding, obstructing, or diverting surface water, and
 4. There is no impact on wetlands.

Present active SFWMD cases involving Section 373.406(2) ag exemption:

Hyatt Farms (Mack Farms, Latt Maxcy)

Buck Daniel

RLI

Aida Fernanadez (settled)

Note Also:

"Agricultural Closed System" Exemption under Section 373.406(3)

Applicable only when the ag operation "[r]equires water only for the filling, replenishing, and maintaining the water level thereof."

Environmental Restoration or Water Quality Improvement on Ag Lands – Exemption
under Section 373.406(9)

Exemption not for the farm itself, only for the improvements

Northern Everglades Statute, Section 373.4595 – DACS Program / WOD Rule

Environmental Resource Permits for Long-Standing Agricultural Operations

HB 421

A bill to be entitled

An act relating to agricultural-related exemptions to water management requirements; amending s. 373.406, F.S.; revising an exemption for agricultural-related activities to include certain impacts to surface waters and wetlands; providing for retroactive application of the exemption; amending s. 373.407, F.S.; providing exclusive authority to the Department of Agriculture and Consumer Services to determine whether certain activities qualify for an agricultural-related exemption under specified conditions; requiring a specified memorandum of agreement between the department and each water management district; authorizing the department to adopt rules; amending s. 403.927, F.S.; providing an exemption from mitigation requirements for converted agricultural lands under certain conditions; revising the definition of the term "agricultural activities" to include cultivating, fallowing, and leveling and to provide for certain impacts to surface waters and wetlands; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 373.406, Florida Statutes, is amended to read:

373.406 Exemptions.—The following exemptions shall apply:
(2) Notwithstanding s. 403.927, nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the

HB 421

2011

29 occupation of agriculture, silviculture, floriculture, or
30 horticulture to alter the topography of any tract of land,
31 including, but not limited to, activities that may impede or
32 divert the flow of surface waters or adversely impact wetlands,
33 for purposes consistent with the practice of such occupation.
34 However, such alteration or activity may not be for the sole or
35 predominant purpose of impeding ~~impounding~~ or diverting the flow
36 of ~~obstructing~~ surface waters or adversely impacting wetlands.
37 This exemption has retroactive application to July 1, 1984.

38 Section 2. Section 373.407, Florida Statutes, is amended
39 to read:

40 373.407 Determination of qualification ~~Memorandum of~~
41 ~~agreement~~ for an agricultural-related exemption. In the event of
42 a dispute as to the applicability of an exemption, No later than
43 July 1, 2007, the Department of Agriculture and Consumer
44 Services and each water management district shall enter into a
45 memorandum of agreement under which the Department of
46 Agriculture and Consumer Services shall assist in a
47 determination by a water management district or landowner may as
48 to whether an existing or proposed activity qualifies for the
49 exemption in s. 373.406(2). The memorandum of agreement shall
50 provide a process by which, upon the request of a water
51 management district, the Department of Agriculture and Consumer
52 Services to make a binding determination shall conduct a
53 nonbinding review as to whether an existing or proposed activity
54 qualifies for an agricultural-related exemption under ~~in~~ s.
55 373.406(2). The Department of Agriculture and Consumer Services
56 and each water management district shall enter into a memorandum

HB 421

2011

57 of agreement or amend an existing memorandum of agreement which
58 sets forth shall provide processes and procedures by which the
59 Department of Agriculture and Consumer Services shall undertake
60 its this review, make a determination effectively and
61 efficiently, and provide notice of its determination to the
62 applicable water management district or landowner. The
63 Department of Agriculture and Consumer Services has exclusive
64 authority to make the determination under this section and may
65 adopt rules to implement this section and s. 373.406(2) issue a
66 recommendation.

67 Section 3. Subsection (3) and paragraph (a) of subsection
68 (4) of section 403.927, Florida Statutes, are amended to read:

69 403.927 Use of water in farming and forestry activities.-

70 (3) If land served by a water management system is
71 converted to a use other than an agricultural use, the water
72 management system, or the portion of the system which serves
73 that land, will be subject to the provisions of this chapter.
74 However, mitigation under chapter 373 or this chapter to offset
75 any adverse effects caused by agricultural activities that
76 occurred before the conversion of the land is not required if
77 the activities occurred on the land in at least 4 of the last 7
78 years preceding the conversion.

79 (4) As used in this section, the term:

80 (a) "Agricultural activities" includes all necessary
81 farming and forestry operations which are normal and customary
82 for the area, such as site preparation, clearing, fencing,
83 contouring to prevent soil erosion, soil preparation, plowing,
84 planting, cultivating, harvesting, fallowing, leveling,

HB 421

2011

85 construction of access roads, and placement of bridges and
86 culverts, provided such operations are not for the sole or
87 predominant purpose of impeding ~~do not impede~~ or diverting
88 ~~divert~~ the flow of surface waters or adversely impacting
89 wetlands.

90 Section 4. This act shall take effect July 1, 2011.

USACE.Notice..Location: Entire State of Florida, Puerto Rico, and the US Virgin Islands (UNCLASSIFIED)

From: "Witgenstein, Melinda M SAJ" <Melinda.M.Witgenstein@usace.army.mil>
To: ls-florida-publicnotice@lst.usace.army.mil
Subject: USACE.Notice..Location: Entire State of Florida, Puerto Rico, and the US Virgin Islands (UNCLASSIFIED)
Date: Jan 7, 2011 8:05 AM

A public notice for the permit application described below has been posted at http://www.saj.usace.army.mil/Divisions/Regulatory/publicnotices_Florida.htm

Classification: UNCLASSIFIED

Caveats: FOUO

Project Name: Availability of Draft National Wetland Plant List (NWPL) for Public Comments

Geographic Scope: Entire State of Florida, Puerto Rico, and the U.S. Virgin Islands

Comment Due Date: March 7, 2011

File Name: 20110106-SAJ-Availability of draft NWPL.pdf

On January 6, 2011, the U.S. Army Corps of Engineers published a notice on the Federal Register (Federal Register, Vol. 76, No. 4, pp. 777-780) announcing the availability of the draft National Wetland Plant List for public comments. This Federal Register notice also provides background and additional details about the NWPL update process, as well as guidance on how to submit comments to the draft NWPL.

A copy of this Federal Register Notice is available at:

<http://origin.www.gpo.gov/fdsys/pkg/FR-2011-01-06/pdf/2011-3.pdf>.

Additional related information may also be found at:

http://wetland_plants.usace.army.mil.

Classification: UNCLASSIFIED

Caveats: FOUO

USACE.Notice..Location: All of Florida (UNCLASSIFIED)

1004

1987

Wetlands

Delineation

Manual

Supp 11/11

Corps

From: "Griffin, Jon M SAJ" <Jon.M.Griffin@usace.army.mil>
To: ls-florida-publicnotice@lst.usace.army.mil, ls-specialinterest-publicnotice@lst.usace.army.mil
Subject: USACE.Notice..Location: All of Florida (UNCLASSIFIED)
Date: Dec 22, 2010 11:06 AM

A public notice for the action described below has been posted at
<http://www.saj.usace.army.mil/Divisions/Regulatory/publicnotices/special.htm>

Classification: UNCLASSIFIED

Caveats: FOUO

Project Name: Availability of Final Version of Atlantic and Gulf Coastal
Plain Regional Supplement to the 1987 Wetland Delineation Manual
County: Entire State of Florida

Comment Due Date: None

File Name: 20101222-SAJ-Availability of Final Regional Supplement.pdf

The final version of the Atlantic and Gulf Coastal Plain Regional Supplement
to the 1987 Wetland Delineation Manual is available and ready for use. It
can be downloaded from the Corps Headquarters web page at:
http://www.usace.army.mil/CECW/Pages/reg_supp.aspx

180 PAGES

Classification: UNCLASSIFIED

Caveats: FOUO

--- If you no longer wish to receive these notifications, please send an email to
<mailto:Melinda.M.Witgenstein@usace.army.mil>

--- If you have comments regarding the permit application described above, please do
not reply to this email. Your response should be provided to the project manager as
described in the text of the notice.