



WHITE & CASE

# Special Issues Regarding Wetland Regulation in Agricultural Areas

Florida Environmental Permitting Summer School

July 25, 2014

Neal McAliley

# Overview of Presentation

---

- **Special Provisions of Federal Law Relating to Wetlands and Agricultural Areas**
  - Activity exemptions related to agriculture
  - Area exemption for croplands
  - Agricultural areas and the definition of “wetlands”
  - Nationwide permits
  - *Rapanos* issues relating to agricultural areas
- **Questions to Consider Regarding Jurisdictional Status of a Site**
- **Examples of These Issues in Florida**
  - Sartori Case
  - Everglades Agricultural Area
  - Recent Jurisdictional Determinations

## Why Is This Issue Important?

---

- **Special wetland regulatory rules apply to agricultural areas**
- **Agricultural sites are often the best location for new projects**
  - Special exemptions for agricultural activities may not apply to non-agricultural activities
  - Project proponents need to understand that there are specialized issues on agricultural land
- **Clean Water Act permitting requirements are often the only federal action which trigger NEPA and the Endangered Species Act**

# Basics of Federal Wetland Regulation

---

- **Clean Water Act, 33 U.S.C. § 1251, *et seq.*, is the source of federal regulatory authority over wetlands**
- **CWA prohibits the discharge of dredged or fill material into the waters of the United States**
  - Not all activities involve a “discharge”
  - Not all areas are “waters of the United States”
- **U.S. Army Corps of Engineers administers the permitting program under oversight of U.S. Environmental Protection Agency**
- **Two sets of regulations address CWA permitting in wetlands**
  - USACE: 33 CFR §§ 322, 323, 325
  - EPA: 40 CFR § 232
- **Extensive body of guidance memoranda issued by agencies relating to wetland permitting**
  - USACE Regulatory Guidance Letters
  - Joint USACE-EPA guidance memoranda

# Agricultural Activity Exemptions

---

- **CWA itself exempts certain agricultural *activities* from the need for a permit**
  - CWA Section 404(f)(1) identifies specific activities for which the discharge of dredged or fill material “is not prohibited or otherwise subject to regulation”
    - “normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil or water conservation practices”
    - “construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches”
    - “construction or maintenance of farm roads or forest roads ... where such roads are constructed and maintained in accordance with best management practices”
  - Section 404(f)(2) “recaptures” jurisdiction if certain effects occur:
    - “Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.”

# Agriculture Activity Exemptions

---

- **Two sets of regulations apply these exemptions**
  - EPA: 40 CFR § 232.3
  - Army Corps: 33 CFR §§ 322.4, 323.4
- **Exemptions are strictly construed against the private party**
- **Issues with application of the activity exemptions**
  - Does the specific activity in question fall into one of the defined categories
    - Is a ditch in question a “drainage” or “irrigation” ditch?
    - Are farm buildings on a large farm part of the “normal farming activity”?
  - What is the intention of engaging in the activity
    - Is its “purpose [to] bring[] an area of the navigable waters into a use to which it was not previously subject”?
  - What is the effect of the activity on the navigable waters
    - Is “the flow or circulation of navigable waters ... impaired or the reach of such waters ... reduced”?

## Prior Converted Croplands

---

- **In 1993, EPA and USACE codified an exclusion to regulatory definition of “waters of the United States” for “prior converted croplands” [58 Fed. Reg. 45008, 45032 (Aug. 25, 1993)]**
  - “Prior converted croplands” are “wetlands that were both manipulated ... and cropped prior to 23 December 1985, to the extent that they no longer exhibit important wetland values . . . [and which are] inundated for no more than 14 consecutive days during the growing season”
  - PCC exclusion intended to make Clean Water Act wetland regulation consistent with regulation of wetlands under “Swampbuster” provision of 1985 Food Security Act
- **This exclusion exempts a *geographic area* from jurisdiction (as opposed to a certain type of activity)**

# Prior Converted Croplands

---

- **Circumstances when PCC loses its exempt status**

- Abandonment

- 1993 Final Rule states that PCC lose their exempt status if they are “abandoned,” i.e., agricultural activities cease for five years and wetland conditions return

- Change of Use

- 1993 Final Rule indicates that PCC does not lose its exempt status merely because a nonagricultural use is proposed

- “A few commenters opposed the use of prior converted croplands for nonagricultural uses. ... In response ... the agencies note that today’s rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA jurisdiction is made regardless of the types or impacts of activities that may occur in those areas.” [42 Fed. Reg. 45008, 45033-34 (Aug. 25, 1993)]

- **Issues to consider**

- What types of agricultural activities are covered?

- Applies to production of “commodity crops”

- What is the significance of a PCC determination under the Food Security Act?

- What is the scope of a prior converted cropland?

## Definition of Wetlands under CWA

---

- **Clean Water Act regulates “navigable waters,” which are defined as “waters of the United States.” [33 USC §§ 1344(a), 1362(7)]**
- **CWA regulations define “waters of the United States” to include “wetlands” [42 Fed. Reg. 37122, 37144 (July 19, 1977)]**
  - “Wetlands” are defined as “those areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” [*E.g.*, 33 CFR § 328.3(b)].
  - All three characteristics must be present for area to be a “wetland”: hydric soils, wetland hydrology, and wetland vegetation under “normal circumstances”

# Historical Treatment of Former Wetlands under CWA

---

- **1970s: USACE stated that “[w]e do not intend ... to assert jurisdiction over those areas that once were wetlands and part of an aquatic ecosystem, but which, in the past, have been transformed into dry land for various purposes.” [42 Fed. Reg. 37122, 37128 (July 19, 1977)]**
- **1980s: Regulatory Guidance Letters 82-2 and 86-9 reaffirmed USACE position that former wetlands are not regulated under the Clean Water Act**
  - “[I]t is our intent under Section 404 to regulate discharges of dredged or fill material into the aquatic ecosystem as it exists and not as it may have existed over a record period of time. The wetland definition is designed to achieve this intent. ... Many areas of wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. However, such natural circumstances are not what is meant by ‘normal circumstances’ in the definition quoted above. ‘Normal circumstances’ are determined on the basis of an area’s characteristics and use, at present and in the recent past. Thus if a former wetland has been converted to another use (other than by recent unpermitted action not subject to 404(f) or 404(r) exemptions) and that use alters its wetland characteristics to such an extent that it is no longer a ‘water of the United States,’ that area will no longer come under the Corps’ regulatory jurisdiction for purposes of Section 404.” [RGL 86-9]
- **2005: USACE affirms that RGL 86-9 is “still generally applicable”**

# Federal Wetland Manual

---

- **1987 Wetland Manual**

- Typical Situations: All three wetland characteristics – hydric soils, wetland hydrology, and wetland vegetation – must be present at time of delineation for area to be a regulated wetland
- Atypical Situations: Wetland determination may be made where “positive indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology could not be found due to effects of recent human activities or natural events”
  - Three categories of “atypical wetlands”: “unauthorized activities,” “natural events,” and “man-induced wetlands”
  - “Unauthorized activities” section states that it “is not applicable to areas that have been drained under CE authorization or that did not require CE authorization,” and states that “[i]t is especially important to determine whether the alteration occurred prior to implementation of Section 404.”

- **2010 Regional Supplement to Wetland Manual: Atlantic and Gulf Coastal Plain**

- Regional Supplement provides additional information to delineate wetlands in Florida
- Regional Supplement states that it does not replace the 1987 Wetland Manual provisions regarding “atypical situations”

# Nationwide Permits

---

- **USACE issues “nationwide” permits to cover certain classes of activities**
  - <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/NationwidePermits.aspx>
- **NWPs assume that there is regulatory jurisdiction over a site, but authorize the activity**
  - Contrast with activity exemptions in CWA § 404(f)
- **Several NWPs address activities that occur on farmlands**
  - NWP 14 – Linear Transportation Projects
  - NWP 40 – Agricultural Activities
  - NWP 41 – Reshaping Existing Agricultural Ditches
  - NWP 46 – Discharges in Ditches
- **Procedure**
  - Some NWPs require pre-construction notification to the Army Corps
  - Other NWPs have conditions that are specialized for the Jacksonville District

# Nationwide Permit 40: Agricultural Activities

---

- **Generally authorizes “discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities”**
  - Authorized activities include
    - Installation, placement or construction of drainage tiles, ditches, or levees
    - Mechanized land clearing
    - Land Leveling
    - Relocating existing serviceable ditches
    - “Similar activities”
- **Limitations**
  - Discharge may not cause the loss of greater than ½ acre of non-tidal waters of the US
  - No discharges into wetlands adjacent to tidal waters
- **Pre-construction notification required**

# Nationwide Permit 46: Discharges in Ditches

---

- **Generally authorizes “discharges of dredged or fill material into non-tidal ditches” that are**
  - Constructed in uplands,
  - Receive water from a water of the US prior to construction of the ditch,
  - Divert water to a water of the US prior to construction of the ditch, and
  - Are waters of the US
- **Limitations**
  - Discharge may not cause the loss of greater than 1 acre of waters of the US
  - No discharges allowed into streams or other waters of the US
  - No discharges that increase the capacity of the ditch and drain those areas determined to be waters of the US prior to construction of the ditch
- **Pre-construction notification required**

# Rapanos Issues Related to Agricultural Areas

---

- **Background Regarding *Rapanos* Issue**

- CWA regulations define “waters of the United States” to include
  - “Tributaries of jurisdictional waters”
  - “Wetlands adjacent to jurisdictional waters”
- *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985)
  - Supreme Court held that Clean Water Act allows regulation of wetlands abutting other bodies of jurisdictional waters (such as tributaries)
- *Rapanos v. United States*, 547 U.S. 715 (2006)
  - Supreme Court overturned finding that certain “wetlands, which lie near ditches or manmade drains that eventually empty into traditionally navigable waters” are jurisdictional, and remanded for new determination
  - Kennedy concurring opinion: “[T]he Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”

# Rapanos Issues Related to Agricultural Areas

---

- **Current Regulatory Status of Ditches**

- Jurisdictional status of ditches is important for agricultural areas
  - Ditches typically cross farmlands in Florida, which means that there potentially may be stripes of regulatory jurisdiction across farms
  - If ditches are “tributaries,” then any area next to a ditch which arguably is a wetland has the potential to be an “adjacent wetland” within federal jurisdiction
- In 1980s, agencies indicated ditches generally are not jurisdictional
  - *E.g.*, USACE, *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986) (“For clarification, it should be noted that we generally do not consider the following waters to be ‘Waters of the United States.’ ... (a) Non-tidal drainage and irrigation ditches excavated on dry land. ...”)
- Some courts in non-permitting contexts held that ditches are jurisdictional “waters of the United States”
  - Criminal cases under the CWA
  - Enforcement cases in NPDES context

# Proposed New Rule Defining “Waters of the US”

---

- **EPA and Corps have proposed to revise the definition of “waters of the US”**
  - Proposed Rule broadly includes
    - All “tributaries of a traditionally navigable water”
      - “Tributary” is defined as a water with bed, banks ordinary high water mark, and “which contributes flow” to a downstream jurisdictional water
    - “All waters, including wetlands, adjacent to ... [a] tributary”
      - “Adjacent” is defined as “bordering, contiguous or neighboring,” and “neighboring” includes areas within the “floodplain” of a jurisdictional water or waters with a “shallow subsurface hydrologic connection” to jurisdictional waters
  - The Proposed Rule would contain limited exclusions for ditches
    - “Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow”
    - “Ditches that do not contribute flow, either directly or through another water, to a traditionally navigable water”
  - The Proposed Rule would retain the exclusions for “prior converted croplands” and “waste treatment systems”
- **Proposed Rule is open for public comment through October 2014**

# Issues to Consider When Evaluating CWA Regulatory Status of a Given Farm Site

---

- **Question 1: Do any portions of the site meet the definition of a “water of the US”?**
  - Do the fields meet the definition of a wetland under the 1987 Wetland Manual
    - All three of the following must be present:
      - Wetland soils
      - Wetland hydrology
      - Wetland vegetation under normal circumstances
    - If any of the three are missing, does the site meet the definition of an “atypical situation” as defined in the 1987 Wetland Manual
  - Are there ditches on the site which
    - Connect to off-site waters
    - Located in wetland areas
    - Use for navigation
  - Are there other discrete bodies of surface water might be deemed “adjacent” to a jurisdictional “water of the US”
    - How close are they to a “tributary”
    - What type of hydrological connection is there
  - Does a geographic exclusion to federal wetland jurisdiction apply
    - Prior converted cropland
    - Waste treatment system
  - If there are any “waters of the US,” can the project avoid them

## Issues to Consider When Evaluating CWA Regulatory Status of a Given Farm Site

---

- **Question 2: If the project cannot avoid a “water of the US,” is the proposed activity subject to regulation under the Clean Water Act?**
  - Does the project propose to discharge dredged or fill material into the “water of the US”
    - Dredging is not directly regulated under the Clean Water Act, only the discharge of the dredged material
  - Is the activity exempt from Clean Water Act permitting under Section 404(f)
    - Does the activity fall within one of the identified activities
      - Normal farming activities
      - Construction or maintenance of farm roads
    - Is the purpose of the activity to bring an area of navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced

## Issues to Consider When Evaluating CWA Regulatory Status of a Given Farm Site

---

- **Question 3: If the site and activity are not exempt, is the activity subject to a Nation-Wide Permit?**
  - Is the activity one of the NWPs identified by the Corps (e.g., NWP 40 for “agricultural activities”)
  - Does the activity fit within the restrictions contained in the NWP
  - Does the Corps need to receive pre-construction notification

# Case Study: The Sartori Case

---

- **Case involved an 1280-acre tract in Highlands County, near Lake Istokpoga**
- **Site was historically wetlands, but was drained in the 1960s through a series of drainage ditches built pursuant to a flood control project**
  - The site had wetland soils and wetland vegetation
  - There was no wetland hydrology
- **In the early 1990s, the landowners began to clear the property using bulldozers**
- **Agencies initiated enforcement proceedings**
  - Army Corps issued Cease and Desist Letter
  - EPA issued a Compliance Order
  - Justice Department ultimately filed a civil lawsuit in U.S. District Court
- **Court determined that site was not a “wetland” within the meaning of 1989 Wetland Manual**
  - The site did not have all three wetland characteristics necessary for a “typical” wetland
  - Federal agencies claimed that site was an “atypical” wetland because it had been drained
  - Court held that the “atypical situation” provision of the Wetland Manual did not apply, because wetland hydrology was missing as a result of activities that were previously authorized or were exempt from Army Corps regulation

# Case Study: Everglades Agricultural Area

---

- **The Everglades Agricultural Area is an area of former wetlands which were diked and drained for agriculture starting in the 19<sup>th</sup> Century**
- **For years, USACE treated farm fields in the Everglades Agricultural Area as exempt from CWA regulatory jurisdiction**
  - **Example: 1993 USACE Jurisdictional Determination issued to Okeelanta Corp. and Osceola Farms regarding sugar cane fields to be used for expansion of sugar mills**
    - “The location sites referenced above will not require a Department of Army permit as these wetlands have been determined to be Prior Converted Wetlands (PC) and are not regulated by the U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act.”
  - **Example: 1996 USACE Final EIS for Everglades Construction Project / Stormwater Treatment Areas**
    - EIS evaluated approximately 46,000 acres in the EAA, composed of cane fields, canals, ditches, and “abandoned agricultural land,” and determined that construction would affect only approximately 1,500 acres of jurisdictional wetlands
    - “The non-wetland areas that would be converted to STAs include approximately 36,000 acres that currently are cropland.”
- **In 2000s, USACE asserts jurisdiction over farm fields**
  - **Example: 2004 USACE Jurisdictional Determination for Expansion of Stormwater Treatment Areas**
    - “Project located in the Everglades Agricultural Area (EAA) and includes agricultural areas, wetlands, and ditches/canals. Historically entire area was Everglades, i.e., sawgrass marsh and tree islands but area has been ditched and farmed. Ditches throughout EAA, which includes project site, are considered Waters of the United States since excavated from Waters of the United States and are tributary. Agricultural areas exhibit hydrology and hydric soils so jurisdictional through application of ‘atypical area’ methodology.”

# Case Study: Everglades Agricultural Area

---

- **In January 2009, USACE Jacksonville District prepared an “Issue Paper” regarding its approach to jurisdictional determinations in EAA**
  - Prior Converted Croplands.
    - PCC designations no longer apply where a property owner proposes a change from an agricultural to a nonagricultural use
    - USACE must use NRCS regulations under the Food Security Act to determine if an area is PCC under the CWA
  - Atypical Wetlands.
    - Areas where there is a proposed change to a nonagricultural use would be evaluated under the “atypical situations” section of the 1987 Wetland Manual
    - USACE will base wetland determination on what it believes site conditions would be if active agricultural pumps were turned off, i.e., without regard to whether pumping was authorized and without regard to current conditions

## Case Study: Everglades Agricultural Area

---

- **Two lawsuits filed in U.S. District Court against USACE regarding Issue Paper and related memoranda (collectively referred to as the “Stockton Rules”)**
- **Plaintiffs claimed that the Stockton Rules were illegal because the USACE memos changed the rules governing CWA jurisdiction without following APA notice-and-comment procedures**
- **District Court ruled that new standards contained in the Stockton Rules are inconsistent with prior agency rules**

“There has been a definite shift in the Corps’ substantive rules regarding what the Corps considers wetlands. ... [B]efore the Stockton Rules, prior converted cropland that was shifted to nonagricultural use was treated as exempt. Following the Stockton Rules, the opposite was true. Similarly, prior to the Stockton Rules, continuous pumping to preserve a converted cropland’s state did not impact a property’s entitlement to a prior converted cropland designation. Following the Stockton Rules, the opposite was true. Thus, the Stockton Rules broadly extended the Corps’ jurisdiction and sharply narrowed the number of exempt prior converted croplands.” [*New Hope Power Co. v. USACE*, \_\_ F.Supp.2d \_\_\_, 2010 WL 3834991, \*15 (S.D. Fla. Sept. 29, 2010)]

- **Court issued injunction that “[t]he Corps may not, without engaging in rulemaking using appropriate notice and comment procedures, determine the existence of wetlands in a manner inconsistent with this Order.”**

# Case Study: Everglades Agricultural Area

---

- **Recent USACE Jurisdictional Statements in the EAA**

- **2011 USACE Jurisdictional Determination for U.S. Sugar “Lake Harbor Quarry”**

- JD considered approximately 7,600 acres of active sugar cane fields
    - Jacksonville District determinations:
      - USACE did not find jurisdiction over the farm fields
      - JD did assert jurisdiction over the ditches on the site
        - Ditches were deemed to be “tributaries” of downstream “traditionally navigable waters”
        - USACE found a “significant nexus”
    - Landowner filed an administrative appeal, and the USACE review officer found that the administrative record did not support the “significant nexus” determination

- **July 2013 USACE Final EIS for A-1 Flow Equalization Basin**

- Final EIS considered SFWMD proposal to build a Flow Equalization Basin on approximately 21,000 acres in the EAA
    - The site is very similar to sites used for the STAs, except that farming had stopped in 2009 and SFWMD had previously excavated some areas for a previous reservoir project
    - USACE generally found farm fields to be jurisdictional:

“The lands within the A-1 project site have been previously farmed. However, the lands were taken out of agricultural use and the wetland hydrology, hydric plants, and hydric soils have returned. Therefore, the USACE’s regulatory jurisdiction under Section 404 of the Clean Water Act includes the project site ...”

Worldwide. For Our Clients.

[whitecase.com](http://whitecase.com)

---

**White & Case LLP**

200 South Biscayne Blvd.

Miami, Florida 33133

United States

Tel: + 1 305 995 5255

[nmcaliley@whitecase.com](mailto:nmcaliley@whitecase.com)

In this presentation, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.