

# *Legal Perspectives on Florida Wetland Jurisdiction*

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# History

- \* 1993 – Florida Environmental Reorganization Act
  - \* Different wetland jurisdictions for DEP and WMDs
  - \* DEP – Contiguous Wetlands
  - \* WMDs – Contiguous and Isolated Wetlands
  - \* New Statutory Definition of Wetlands
  - \* Section 373.421, Florida Statutes - Directive for ERC to Adopt Unified Statewide Rule

# History

- \* 1994 – Wetlands Act
  - \* Legislative Adoption of Unified Statewide Rule with modifications to ERC adopted rule
  - \* Wetland Definitions and Delineation Rules Applicable to all Levels of Government
  - \* Legislature Preempts Agencies and Governments Ability to Adopt a Different Wetland Definition or Delineation Methodology

# Wetland Definition

Section 373.019(27), Florida Statutes and 62-340.200(19), F.A.C --

“Wetlands” means those areas that are inundated or saturated by surface water or groundwater at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce, or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by saw palmetto.

# Wetland Delineation Standard

- \* 62-340.300, FAC
- \* Wetland limit shall be determined by applying reasonable scientific judgment to evaluate the dominance of plant species, soils, and other hydrologic evidence of regular and periodic inundation and saturation
- \* Reasonable Scientific Judgment not defined
- \* Legislature Replaced “Preponderance of Evidence” in ERC Rule with “Reasonable Scientific Judgment”

# Wetland Tests - Definition

- \* Wetland Definition is First Wetland Test – 62-340.300(1), FAC
- \* Inundated or saturated with sufficient frequency and duration
- \* Hydric or alluvial soils
- \* Vegetation with the ability to grow, reproduce, or persist in aquatic environments or anaerobic soil conditions
- \* Swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas
- \* Generally not longleaf or slash pine flatwoods with an understory dominated by saw palmetto.

# Wetland Tests – A Test

- \* 62-340.300(2)(a), FAC
- \* Extent of Obligate Vegetation exceeds Upland Vegetation and either:
  - \* Substrate is composed of hydric soils or riverwash hydric soil indicators would be present but for the disturbance
  - \* Substrate is nonsoil, rock outcrop-soil complex, or located within an artificially created wetland area
  - \* One or more hydrologic indicators and reasonable scientific judgment indicates that inundation or saturation is present sufficient to meet wetland definition

# Wetland Tests – B Test

- \* 62-340.300(2)(b), FAC
- \* Obligate and Facultative wet plants is equal to or greater than 80% of area (upland plants are 20% or less of area) and either:
  - \* Substrate is composed of hydric soils or riverwash hydric soil indicators would be present but for the disturbance
  - \* Substrate is nonsoil, rock outcrop-soil complex, or located within an artificially created wetland area
  - \* One or more hydrologic indicators and reasonable scientific judgment indicates that inundation or saturation is present sufficient to meet wetland definition



# Wetland Tests – C Test

- \* 62-340.300(2)(c), FAC
- \* Areas with undrained hydric soils with at least one of the criteria listed below. A hydric soil is considered undrained unless reasonable scientific judgment indicates permanent artificial alterations which would not support the formation of hydric soils
- \* Soils classified according to United States Department of Agriculture's *Keys to Soil Taxonomy* (4th ed. 1990) as Umbraqualfs, Sulfaquents, Hydraquents, Humaquepts, Histosols (except Folists), Argiaquolls, or Umbraquults.
- \* Saline sands (salt flats-tidal flats).
- \* Soil within a hydric mapping unit designated by the U.S.D.A.-S.C.S. as frequently flooded or depressional, when the hydric nature of the soil has been field verified using the U.S.D.A.-S.C.S. approved hydric soil indicators for Florida.
- \* Doesn't apply to pine flatwoods or improved pastures

# Wetland Tests – D Test

- \* 62-340.300(2)(d), FAC
- \* One or more of the hydrologic indicators listed in Rule 62-340.500, F.A.C., are present, and
- \* Hydric soils, as identified using the U.S.D.A.-S.C.S. approved hydric soil indicators for Florida, and
- \* Reasonable scientific judgment indicates that inundation or saturation is present sufficient to meet the wetland definition
- \* Shall not extent beyond the seasonal high water elevation.

# Wetland Tests – Legally Altered Sites Test

- \* 62-340.300(3)(a), FAC
- \* DEP Guidance Memo
- \* Applies to exceptional circumstances where because of legal alterations A-D Tests can't be used
- \* Must still be a wetland
- \* Most reliable available information used with reasonable scientific judgment to determine where A-D Tests would have delineated the boundary between wetlands and uplands.
- \* Reliable available information may include, but is not limited to, aerial photographs, remaining vegetation, authoritative site-specific documents, or topographical consistencies.



# Wetland Tests – Illegally Altered Sites Test

- \* 62-340.300(3)(c), FAC and DEP Guidance Memo
- \* Similar to altered sites test for legal sites
- \* Does not consider the alterations as they exist but rather what they were immediately before the illegal activities took place.

# Rebutting Wetland Delineations

- \* 62-340.550, FAC
- \* Either reliable hydrologic records or site specific hydrologic data which indicate that neither inundation for at least seven consecutive days, nor saturation for at least twenty consecutive days, occurs during conditions which represent long-term hydrologic conditions.
- \* Data must be of such a duration, frequency, and accuracy to demonstrate that the records or data are representative of the long-term hydrologic conditions, including the variability in quantity and seasonality of rainfall.
- \* When data are not available a site-specific field-verified analytic or numerical model may be used.
- \* Before initiating the use of a model, the applicant or petitioner shall first meet with the appropriate regulating agency and reach an agreement on the terms of study, including data collection, the specific model, model development and calibration, and model verification.
- \* If the data, analyses, or models are deemed inadequate the regulating agency shall provide a case-by-case review and provide specific reasons, based on generally accepted scientific and engineering practices, why they are inadequate.

# Exemptions

- \* 62-340.700, FAC
- \* Wastewater Treatment areas except wetlands used for treating effluents under permit.
- \* Small (less than 0.5 acres of combined area) Stormwater Treatment areas
- \* Larger (greater than 0.5 acres of combined area) Stormwater Treatment areas. Protection of threatened and endangered species in isolated wetlands applies
- \* However, previously existing wetlands incorporated into Stormwater Treatment areas are not exempt – they are delineated
- \* 62-340.750, FAC
- \* Historic uplands which have become *wetland* **solely** because of excavation or impoundment conducted **solely** for the purpose of mosquito control

# Surface Water Delineations

- \* 62-340.600, FAC
- \* The mean high water line elevation for tidal water bodies;
- \* The ordinary high water line for non-tidal natural water bodies;
- \* The top of the bank for artificial lakes, borrow pits, canals, ditches and other artificial water bodies with side slopes of 1 foot vertical to 4 feet horizontal or steeper, excluding spoil banks when the canals and ditches have resulted from excavation into the ground; or
- \* The seasonal high water line for artificial lakes, borrow pits, canals, ditches, and other artificial water bodies with side slopes flatter than 1 foot vertical to 4 feet horizontal along with any artificial water body created by diking or impoundment above the ground.

# Grandfather Provisions

- \* Section 373.414(12)(b), Florida Statutes
- \* Surface water and wetland delineations identified and approved as part of a permit issued pursuant to chapter 373, part IV, prior to the effective date of the ERP rules.
- \* Demonstrate that the delineation was:
  - \* Field-verified by the permitting agency; and
  - \* Surveyed as part of the application review; or
  - \* Approved by the permit.



# Grandfather Provisions

- \* Section 373.414(12)(b), Florida Statutes
- \* When delineation not identified and approved by a permit.
- \* Delineation in geographical area of a permit is determined pursuant to the rules applicable at the time the permit was issued
- \* Delineation remains valid until the permit expires.
- \* The grandfather applies to modifications of an existing permit within the geographic area to which the permit applies.

# Grandfather Provisions

- \* Section 373.414(12)(c), Florida Statutes
- \* Grandfathers wetland delineations under section 403.914 jurisdictional declaratory statement for Chapter 403 dredge and fill permits.
- \* Valid for the duration of the permit
- \* Used for any modification of the permit.

# Grandfather Provisions

- \* Section 373.414(13), Florida Statutes
- \* Grandfather for Jurisdictional Declaratory Statements petitioned for prior to June 1, 1994
- \* They remain valid for the duration of the Jurisdictional Declaratory Statements

# Grandfather Provisions

- \* Section 373.414(13), Florida Statutes
- \* Grandfather for pre-Henderson Act validated jurisdictional determination validated by DEP
- \* Validated Jurisdictional Determinations remain valid until completion of the project where:
  - \* development order has been issued pursuant to Section 380.06(15), Florida Statutes;
  - \* final development order has been issued pursuant to Section 163.3167(8), Florida Statutes; or
  - \* a vested rights determination has been issued pursuant to Section 380.06(20), Florida Statutes;

# Grandfather Provisions

- \* Section 373.414(15), Florida Statutes
- \* Grandfather for Phosphate and Fuller's Earth mines
- \* Applies to:
  - \* Conceptual reclamation plans or modifications submitted prior to July 1, 1996
  - \* Lands added to a conceptual reclamation plan through a modification submitted after July 1, 1996, which are contiguous to the conceptual reclamation plan area
    - \* the total acreage of the conceptual reclamation plan may not be increased and the cumulative acreage added may not exceed 3 percent of the conceptual reclamation plan area.

# Grandfather Provisions

- \* Section 373.421(7), Florida Statutes
- \* Grandfather for qualified developments to their pre-Henderson Wetland Protection Act status for contiguous wetlands
- \* Requires individual permit from the United States Army Corps of Engineers and either:
  - \* jurisdictional determination validated by the Department and the affected lands are part of a project for which a vested rights determination has been issued, or
  - \* the lands affected were grandfathered pursuant to section 403.913(6), F.S., and proof of prior notification was submitted to the DEP before January 17, 1996.
- \* Additional limitations apply

# Formal Determinations

- \* Rule 62-330.201, FAC and ERP AH Volume I, Section 7
- \* Requires Petition using Completed Form and Fee
- \* RAIs allowed
- \* A formal determination is binding on the real property for 5 years provided physical conditions do not change except by permitted activity
- \* Completed 60 days after completion
- \* 10+ acres requires initial delineation by Petitioner
- \* Can be surveyed, GPS or aerial drawing
- \* Point of Entry to Challenge under Chapter 120, Fla Stat

# Informal Determinations

- \* ERP AH Volume I, Section 7.3
- \* On Agency's own initiative, as Agency staff time and resources allow
- \* Fee Required
- \* Not agency action
- \* No Chapter 120 Rights (not agency action and default rules don't apply)
- \* Is subject to change
- \* Does not bind the Agency
- \* Does not convey any legal rights
- \* No right to rely upon determination for purposes of compliance with law or Agency rules



# Miscellaneous

- \* New UMAM
- \* New Federal CWA Jurisdictional Rule
  - \* Federal and State Jurisdictional Lines may differ



# QUESTIONS?