



News from the

Cypress Stump

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U.S. Supreme Court's (Non) Decision on Wetland Connections-Rapanos and Carabell

Up to now, the U.S. Army Corps of Engineers (Corps) has maintained jurisdiction on isolated wetlands based on any type of hydrologic connection including small dry ditches and timber bedding rows that could run for miles before connecting to "Navigable Waters" or "Water of the United States". In addition, the Corps has claimed jurisdiction over isolated wetlands that are located within 200 feet of a water body or ditch with ordinary high water indicators, termed "adjacent wetlands". However, in a combined Supreme Court decision, the Court did not agree with the Corps or lower court on a Michigan enforcement case in which isolated wetlands were filled for development. In a 5 to 4 decision, the Court remanded the case back to the lower court holding that both had applied wrong standards in determining whether wetlands are in deed hydrologically connected to Waters of the United States. Though Justice Scalia had the most aggressive view stating any such connection should be relatively

permanent, standing or flowing bodies of water, any revisions in the Corps methodology will be governed by the most narrow opinion, that of Justice Kennedy. In Kennedy's opinion, even if demonstrated surface water connections are absent, an isolated wetland may still fall within the Corps' jurisdiction under the Clean Water Act if it can establish a "significant nexus" between the wetland and navigable waters.

What is a significant nexus? That is the question now being mulled over at the Washington headquarters of the Corps of Engineers and the EPA. You may recall that the Corps used to use migratory birds and out-of-state vacationers as the nexus to demonstrate "interstate commerce". The local Corps District offices are waiting at the edge of their seats for new guidance to trickle down from Washington. All local staff anticipate large and significant changes on how wetland isolation is determined that could affect nearly every land owner in the Southeast. Even though this guidance has been anticipated from week to week for the past eight months, it is now hoped that the guidance will arrive in March, 2007. Until then, it is business as usual unless your project has potential isolated wetlands. If so, then the Corps may table your permit application until the guidance is received. Are we holding our breath? . . .

Wetlands and Agricultural Lands

The U.S. Army Corps of Engineers (Corps) and the St. Johns River Water Management District (District) are changing interpretation of their rules when the land uses are being changed from "agricultural lands" to "development lands".

Wetlands are usually determined on a property using specific features found in plant composition, soil, and on the ground surface. Typically, we find a predominance of wetland plants, features in the soil

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that indicate frequent soil saturation, and evidence that water stands in areas for a week or two during the growing season year. But what happens when legal activities, such as farming and silviculture, remove or alter such features? Natural vegetation is removed and planted with row crops, pasture grasses, or marketable trees. Soils are typically plowed, disked, or bedded, mixing the soil and removing hydrology indicators used for wetland determinations. In the past, such areas were not considered jurisdictional if the obvious indicators were not present.

Recently, however, the District and the Corps have claimed jurisdiction on pasture lands and agricultural fields not based on field wetland indicators, but rather by examination of historical aerial photographs. These areas do not exhibit visual indicators of wetlands in the field and can only be identified by looking at aerial photographs. Color infrared aerial photographs dated back to 1984 and black and white aeriels dated back to 1942 are examined to determine if wetlands existed on the property prior to the change in use to agriculture. Certain photographic signatures such as “dark spots” which are darker than the surrounding areas are typically caused by organic soils which is an indicator normally found in a wetland soil. They are used to assume that the area was a wetland prior to the change in use. These areas are to be examined closer to determine if jurisdiction should be exerted. The District and the Corps, although are simultaneously pursuing this policy, differ in their interpretations.

St. Johns River Water Management District

The District is pursuing jurisdiction on these alleged past wetland areas under a premise that “if the farming activity were to cease, the area would naturally revert back to a wetland over time with the expected vegetation, soil, and hydrology indicators”. If the area is so disturbed through legal plowing and ditching that the hydrology is no longer present to form a wetland, then the area is not jurisdictional. The District is pursuing this authority according to Section of 373 Florida Statutes, commonly called “Disturbed Sites” methodology. Under this methodology, the District can forego the typical methods using “reasonable scientific judgment” and other evidence such as aerial photographs to make this determination.

There are many who believe that use of the “Disturbed Sites” methodology in this manner is in error. The methodology was intended for recent illegal site disturbances that would be considered enforcement actions; not for legal activities such as farming. They

also assert that the method should not be used when the change in land use to agriculture occurred prior to the implementation of these regulations.

U.S. Army Corps of Engineers

The Corps has also jumped on the band wagon in looking at what they consider “prior converted croplands”. In the past, the Corps and the USDA operated under a memorandum of agreement that gave USDA the authority to make wetland jurisdictional determinations on agricultural lands and the Corps on lands with other uses (such as development). Under the agreement, the Corps and the USDA would honor each other’s jurisdictional calls even if the property was changed in land use from agriculture to development. Based on our experience, the USDA was rarely as aggressive on jurisdictional calls as the Corps. However, in February 2004, the USDA and Corps ended the agreement and began regulating wetlands in their respective jurisdictions, not honoring each other’s determinations. The USDA will now make jurisdictional calls on property strictly for agricultural uses under the Food Securities Act. The Corps will now make all determinations under the Clean Water Act for existing agricultural lands that are going to be converted into development lands.

Since this is going to be a change in authority, the Corps is now trying to determine how they will treat such lands. Currently in the Jacksonville District, opinions on implementation of this policy vary widely.

So, What do I do about my farm land?

If you are considering improvement of a property that includes agricultural or silvicultural land, then you will be affected. You should be aware of areas within these farm fields that could possibly be considered jurisdictional wetlands. This information can be used to determine site plan limitations, avoidance and minimization options, and potential wetland mitigation costs.

If you have questions or would like to explore this issue in regard to your sites, call Lee Gerald (904) 824-8633.

Now You See It, Now you Don’t-Gallberry and Slash Pine

In a continuing effort to acquire the delegation of federally regulated wetlands under Section 404 of the Clean Water Act, the Florida Department of Environmental Protection (DEP) is attempting to change the wetland indicator status of two (2) of the most common plants in Florida, slash pine (*Pinus*

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elliottii) and bitter gallberry (*Ilex glabra*). If the DEP is successful in adding these two (2) plant species to their wetland indicator list, this will increase the jurisdictional wetland area under the State of Florida's wetland regulation.

Currently, both plants are considered to be upland under the State of Florida's rule; however, both plants are considered facultative wetland species under the Corps regulations. This is but one of the differences between the State and Corps regulation that hinders a potential merger of regulatory agencies' efforts. In an attempt to compromise, the State of Florida proposes to change the status of both species to facultative with hope that the Corps will follow suit and change its indicator status to "facultative" also, at least within the State of Florida. This will not change the Corps jurisdiction of wetlands in that facultative wetland and facultative plants are considered equal as wetland plants under the Corps definition. However, this change to facultative from upland will have a significant change on the DEP and the Water Management District jurisdiction, effectively making these species invisible in wetland determinations. Previously upland areas that are predominantly slash pine and gallberry, but have an understory of other wetland species such as loblolly bay, red maple, or sweetgum, can now meet the wetland vegetation tests and become a jurisdictional wetland. If you have any questions on how this new ruling could affect you, please call Lee Gerald at (904) 824-8633.

The NEW Environmental Due Diligence Standard

Pursuant to the January 2002 Small Business Liability Relief and Revitalization Act (also known as the Federal Brownfields Law), the EPA recently drafted the nation's first federal standard for conducting "all appropriate inquiries." The new rule was published on November 1, 2005, and the American Society for Testing and Materials (ASTM) issued their AAI-compliant standard in mid-November 2005 (ASTM E1527-05).

Why has the Phase I Environmental Site Assessment (ESA) changed? What are the changes? How will the new standard affect and protect me, the buyer, the developer, the financial institution?

Applicability – The new ASTM E1527-05 standard is similar to the old standard in many areas but adds new areas of investigation. The EPA AAI regulation is

applicable to a wide range of properties including Brownfield sites, commercial properties, owners of residential properties used for commercial purposes, and residential properties under government ownership; however, the ASTM E1527-05 standard is specific to commercial real estate.

Liability – The old Phase I ESA standard provides CERCLA liability protection for an innocent landowner defense, provided certain conditions in the Phase I are met. ***ASTM E1527-05 provides two additional landowner liability protections.*** These include: 1) a Bona Fide prospective purchaser defense, and 2) a contiguous property owner defense. The Bona Fide defense creates liability protection for a property owner who knowingly purchases a contaminated property, provided the owner can demonstrate that on-site contamination occurred prior to the purchase of the property. The contiguous property owner defense provides liability protection for the owner from contamination caused by the migration of hazardous substances from an adjacent property, provided the owner demonstrates that he/she did not know of the contamination on his/her property at the time of purchase. ***To qualify for these liability protections the property owner must conduct an ASTM E1527-05 Phase I ESA investigation before purchase.***

Shelf Life – The ASTM E1527-05 standard allows for the Phase I ESA report to be transferred from one party to another. The report is only valid for up to one year prior to the purchase of the subject property provided specific User's Responsibilities are satisfied. However, the interviews, environmental database search, and visual site inspection may not be more than 180 days old. Therefore, **Phase I ESA Updates** that are performed between 180 and 360 days from the date of the original report can be limited to additional interviews, an environmental database search, and re-inspection of the subject property.

Other Significant Changes

Who can conduct Environmental Inquiries? ASTM E1527-05 provides a definition of an ***environmental professional*** based on licensure (professional geologist, professional engineer), education, and relevant experience. Be sure to verify the qualifications of your environmental consultant before your next due diligence investigation.

ASTM E1527-05 increases the requirement for ***governmental records review***. Significant changes include the addition of Engineering Control Registries, Institutional Control Registries, and Brownfield Lists.

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What *historical sources* can be used and how far back must the property be researched? ASTM E1527-05 allows the environmental professional to use his/her professional judgment to determine which historical sources are reviewed (e.g., aerial photographs, fire insurance maps, property tax maps, topographic maps, city directories, building department records, and zoning/land use records). The historical uses of the subject property must be researched back to the property's first developed use, or back to 1940, whichever is earlier.

Documentation of Data Gaps. If, in the judgment of the environmental professional, after all available and practically reviewable sources have been examined, data gaps exist, then the environmental professional is required to identify and explain the significance of the data gaps.

Up with the Gopher Tortoise, Down with the Eagle

The U.S. Fish and Wildlife Service (USFWS) and the Florida Fish and Wildlife Conservation Commission (FWC) have been busy. The Bald Eagle is in the process of being removed from the Threatened species list and has new interim guidelines that are less stringent than before. In turn, the gopher tortoise is being upgraded to the Threatened species status by the FWC which may drastically change ways the species is handled on development projects. These final status changes are anticipated in February 2007 for the bald eagle and in July 2007 for the gopher tortoise.

Bald Eagle. New interim guidelines reduce the protection zones required around active eagle nests. Prior to June 6, 2006, a 750-foot radius was established around the nest tree as a complete exclusion zone with no development allowed. An additional 750-foot radius restricted zone (total 1500-foot radius) allowed monitored activities during non-nesting seasons. With the release of the June Clearance Letter by the USFWS, now the protection zones have been reduced to a 660-foot or 330-foot radius. Activities permitted within these buffers are dependent on numerous factors including distance from actively utilized structures, visibility of the nest tree from proposed activities, and vegetated buffer adjacent to the nest tree. With these new considerations, existing land uses are now considered, allowing similar land uses within this protection zone in the new development plans. The USFWS is now more acceptable to site plans that

allow passive uses within the protection zones, such as stormwater ponds, passive parks and fields, etc.

Although all of this sounds great, beware. Since the USFWS is essentially bowing out of bald eagle protection with the exception of the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA), the FWC may be stepping up. New guidelines from the State of Florida may be very stringent and possibly more burdensome than the USFWS. Also, be aware of local county ordinances. For example, St. Johns County ordinance still requires the original eagle buffers of 750 and 1500 feet with no respect to the new interim guidelines.

Gopher Tortoise. The upgrading of the gopher tortoise is very preliminary at this time but guess work and speculation is fun. The talk is that the current Incidental Take Permit, in which purchase of mitigation bank credits for up to 25% of the gopher tortoise habitat is the norm, will be eliminated or at least reduced to a useless option. The talk is that on-site preservation and relocation of individuals will be the remaining feasible option.

These new requirements can have drastic effects on site plans that work hard to avoid wetlands by using all of their upland areas. Now relocation permits will be common place, if relocation sites may be found. In preparation of this anticipated motion, the previously required Upper Respiratory Tract Disease (URTD) blood testing of relocated individuals has been suspended. Take note: gopher tortoise recipient sites can become very valuable and lucrative. If you have a property that could possibly be conserved and used to accommodate displaced gopher tortoises, call LG²ES to discuss options.

It is the purpose of this newsletter to share information with our clients and with those who would have a professional or academic interest in environmental and regulatory issues. If you wish to subscribe or unsubscribe to this free non-periodic newsletter, please contact us.