"Overview of Federal and State Wetlands Protection Regulations"

presented by

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I. Introduction

As a result of the last several decades of greater development with impacts to wetlands and other surface waters, federal and state regulations have been created to regulate the activities generally occurring in or adjacent to these waters. This outline provides a brief review of the Federal and State Wetland statutes, rules and regulations that have been adopted. In addition, this outline presents the permitting and enforcement processes that the U.S. Army Corps of Engineers, the Florida Department of Environmental Protection, and Florida's Water Management Districts apply in their regulation of wetlands and other surface waters.

II. Federal Regulation of Wetlands and Other Surface Waters

The federal regulatory portion of this outline serves as an overview of pertinent and current federal regulations of wetlands and other surface waters. It begins with a brief discussion of the Clean Water Act Section 404 and the River and Harbors Act Section 10 permitting processes. Applicable definitions of essential terms are also included. The current state of the Nationwide permits; proposed modifications; and general conditions are also provided. Additionally, a brief description of some permit exemptions, the permitting process and the administrative challenge process are included. This section concludes with a summary of the enforcement procedures.

A. Federal Wetlands Authority: Clean Water Act and River and Harbors Act

The Clean Water Act's (CWA) purpose is "to restore and maintain the chemical, physical, and biological integrity of the "nation's waters." 33 U.S.C. § 1251(a). The CWA's purpose is mirrored in The River and Harbors Act of 1899, 33 U.S.C. § 401 and the Federal Water Pollution Control Act of 1972, which the CWA amended upon its inception in 1976. Together, these Acts grant the authority of regulating waters and wetlands to the U.S. Army Corps of Engineers (CORPS). Section 404 of the CWA specifically grants the Corps the power to regulate "the discharge of dredged and fill material to waters of the United States" through the review of "dredge and fill" permit applications. Additionally, Section 10 of the River and Harbor Act, 33 U.S.C. § 403, grants the Corps the permitting power for "structures or works in or affecting a navigable water of the United States." United States v. Fox, No. 96-C-3661, 1999 WL 202979 (N.D. Ill. 1999).

The Corps uses a number of factors in granting or denying a Section 10 permit. For example, the Corps will consider the projects "impact on natural resources, fish and wildlife, air and water quality, ecology, aesthetics", and the navigability of the waterway. There are a number of devices and structures that require a section 10 permit, such as "boat ramps, piers, breakwaters, jetties, docks, aids to navigation as well as any excavation or placement of any fill material." 33 C.F.R. § 322.1. In addition, the Corps requires "artificial waterways," i.e. canals, that are considered "navigable waters of the United States" or connected to navigable waters to be permitted under a section 10. The procedures for obtaining a section 10 permit are available in 33 C.F.R. parts 322 and 325. Furthermore, the Corps has the authority to determine what is or is not a structure in terms of a Section 10. United States v. Hernandez, 979 F. Supp. 70 (D. P.R. 1997). For example, the Corps considers houseboats as structures because they are "permanently moored" and are obstructions in navigable

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waters; therefore, subject to the requirements of Section 10. United States v. Seda Perez, 825 F. Supp. 447 *D. P.R. 1993).

Section 404 of the Clean Water Act requires that the dredged or fill material of a project be discharged at specified sites after the issuance of a permit. The premise behind this section is to prohibit the discharge of dredged or fill material, if a practicable alternatives exist that are less damaging to the aquatic environment or if the degradation of the nations waters can be avoided. In addition, 33 U.S.C. § 1344 authorizes the Secretary of the Army, acting through the Chief of Engineers, with the power to issue such permits. However, 33 U.S.C. § 1344 binds the Secretary to guidelines prescribed by the Environmental Protection Agency (EPA) which outline whether a permit should be granted or denied. The procedures for obtaining a section 404 permit are made available in 33 C.F.R. parts 323 and 325. In the permitting process, the EPA actively participates in overseeing the Corps' administration and implementation of Section 404 permits. In addition, the United States Department of Interior, Fish and Wildlife Service (FWS), the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), and the National Marine Fisheries Service (NMFS) play a part in assisting the Corps in complying with the Endangered Species Act.

B. Definitions

Waters of the United States

The Code of Federal Regulations (CFRs) provide many of the definitions typically applied in the permitting process. For instance, the "Waters of the United States" is defined in 33 C.F.R. Section 328.2 to include those waters listed in 33 C.F.R. Section 328.3(a):

(a) the term "waters of the United States" means
- *(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;*
- *(2) All interstate waters including interstate wetlands;*
- *(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use degradation or destruction of which could affect interstate or foreign commerce including any such waters:*
  - *(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or*
  - *(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or*
  - *(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;*
- *(4) All impoundments of waters otherwise defined as waters of the United States under the definition;*
- *(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;*
- *(6) The territorial seas;*
- *(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.*
- *(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.*

> *Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.*

The Supreme Court in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, (SWANCC) 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) has recently spoken on the definition of Waters of the U.S. In SWANCC the Supreme Court stated that the Corps 'migratory rule' extending the definition of "navigable waters" under the Clean Waters Act to include those intrastate waters used as habitat by migratory birds was in error.

As a result of SWANCC the interpretation of the limits of jurisdiction for "waters of the United States," has become even more central to the Corps permit review. The limits of jurisdiction for territorial seas, tidal waters and non-tidal waters are as follows:

(a) Territorial Seas. The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles.

(b) Tidal Waters of the United States. The landward limits of jurisdiction in tidal waters:

(1) Extends to the high tide line, or

(2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) Non-Tidal Waters of the United States. The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark; or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetland; or

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

Wetlands

The definition for wetlands was originally not included in the Army Corps of Engineers regulations. However, after much dispute between the E.P.A. and the Corps, the ruling in NRDC v. Callaway, 392 F. Supp. 685 (D. D.C. 1975) forced the Corps to expand its permit regulations to include the definition of wetlands. 33 CFR § 328.3(b) sets out the definition for wetlands:

> *(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marches, bogs, and similar areas.*

Along with the definitions provided for by the CFRs, scientific and technical criteria is used by the Corps in establishing the jurisdiction of wetlands. This criteria uses extensive scientific technical analysis of water, soil and vegetation. The technical and scientific aspect of establishing wetlands jurisdiction is outlined in the Federal Wetlands Delineation Manual. The Manual was adopted for the purpose of establishing a procedure for members of agencies to follow when identifying wetlands, and to advise the public prospectively of the manner in which agency personnel will apply the definition of wetlands to particular sites on a case-by-case basis. 58 Fed. Reg. 49,995. The Manual requires that an agency's staff delineate the existence of a wetland through three elements: hydrophytic vegetation, hydric soils, and wetland hydrology.

Dredge and Fill

As stated previously Section 404 grants the Corps the power to regulate the discharge of dredge and fill material to waters of the United States through the review of "dredge and fill" permit applications. Dredge and fill permits affect different types of waters, eg. Waters of the U.S., wetlands adjacent to waters of the United States, "isolated waters," and groundwater. 33 C.F.R. § 323.2 provides the definitions for the discharge of dredged material, dredged material and fill material:

(c) *Dredged Material is defined as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2 (c).*

(d)(1) Discharge of Dredged Material: " Except as provided below in paragraph (d)(3), the term discharge of dredged material means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:

(i) The addition of dredged material to a specified discharge site located in waters of the United States;

(ii) The runoff or overflow from a contained land or water disposal area; and

(iii) Any addition, including redeposit other than incidental fallback of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(e) The term fill material means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as the activity is regulated under Section 402 of the Clean Water Act. See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

Navigable Waters

Navigable waters of the United States are defined by 33 C.F.R. § 329.4. This section states that bodies of water "subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce" are considered "navigable waters of the United States." 33 C.F.R. § 329.4. United States v. Weisman, 489 F. Supp. 1331 (M.D. Fla. 1980) expanded the definition by stating that a body of water connected to "navigable water of the United States" is also considered navigable waters.

C. Nationwide Permits

Nationwide Permits (NWP) are general permits issued on a nationwide basis by the Corps to authorize minor activities with minimal evaluation time. NWPs are issued for a number of activities on a nationwide basis. In granting a general permit the Corps must follow specific criteria: "the activities must fall into a category that is similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment." 33 CFR § 1344(e). The Army Corps of Engineers is currently in the process of reissuing the existing Nationwide Permits and conditions with certain modifications so that all the NWPs will become affective and expire on the same date. The complete list of NWPs and their conditions can be found in the Federal Register, Volume 66, No. 154 (August 9, 2001). Some of the more commonly used NWPs and their thresholds are as follows (an asterisk indicates that the reissuance proposes a modification):

NWP 1: Aids to Navigation
NWP 12: Utility Line Activities (if in wetlands, the top 6 to 12 inches of the trench to be backfilled; may not exceed one-half acre loss of waters)
NWP 13: Bank Stabilization (limited to 500 feet in length)
NWP 14: Linear Transportation Projects* (limited to one-half acre in non-tidal waters; and one-third in tidal waters)
NWP 16: Return Water From Upland Contained Disposal Areas (limited to one-tenth of an acre for a special aquatic site)
NWP 29: Single-Family Housing (may not be used in conjunction with NWP 14 and NWP 18; limited to the loss of one-fourth of an acre of non-tidal waters)
NWP 31: Maintenance of Existing Flood Control Facilities*
NWP 32: Completed Enforcement Actions (limited to an unauthorized activity affecting five acres for non-tidal waters and one acre for tidal waters)
NWP 38: Cleanup of hazardous and Toxic Waste (limited to one-tenth of an acre of non-tidal waters; cannot result in the loss of more than 300 feet of a stream bed)
NWP 39: Residential, Commercial and Institutional Development* (limited to a loss of no more than one-half of an acre)
NWP 40: Agricultural Activities* (limited to a loss of no more than one-half of an acre)
NWP 41: Reshaping Existing Drainage Ditches (must notify the District Engineer if more than 500 feet of the drainage ditch will be reshaped)
NWP 42: Recreational Facilities* (limited to one-half of an acre of non-tidal waters; cannot result in the loss of more than 300 feet of a stream bed)
NWP 43: Stormwater Management Facilities* (limited to one-half of an acre of non-tidal waters; cannot result in the loss of more than 300 feet of a stream bed)
NWP 44: Mining Activities (acreage loss cannot exceed one-half of an acre)

General Conditions

There are a number of general conditions that NWPs are subject to pursuant to 33 C.F.R. § 330.5. These general conditions are to be followed in order for a NWP to be valid. 33 C.F.R. § 330.5 provides for twenty-six conditions. The following are several of the more significant ones: 1) Navigation; 2) Proper Maintenance; 3) Erosion and Sediment Controls; 4) Regional and Case-by Case Conditions; 5) Wild and Scenic Rivers; 6) Water Quality Certification; 7) Coastal Zone Management; 8) Endangered Species 9) Notification 10) Use of Multiple NWPs; and 11) Mitigation. The reissuance includes some new proposed General Conditions that will apply to all Nationwide permits which relate to: Aquatic Life Movements; Water Quality; Notification; Mitigation; Management of Water Flows; Fill within 100-year Floodplains.

D. Permit Exemptions

33 U.S.C § 1344 (f)(1)(A)-(F) provides for a limited number of exemptions from permitting. These exemptions are limited and cannot be used in certain circumstances. For instance, a permit will still be required if the discharge of dredged or fill material brings an area into use that was not previously subject to that use, or where the flow or circulation of the navigable waters maybe impaired or the reach of the waters reduced. 33 U.S.C § 1344(f)(2). This limitation was discussed in Environmental Defense Fund v. Tidwell, 837 F.Supp. 1344, 1346 (E.D. N.C. 1992). In Tidwell the Court noted that the property owner was using discharged dredge and fill material to change the use of a portion of a swamp to pine tree farming. The Court held that in accordance with section 1344, 1346 the property owner was not exempt from the permitting process and was performing an unlawful discharge of dredged and fill material without a permit. The following activities which involve the incidental discharge of dredged or fill material do not require a permit (except for effluent standards or prohibitions under 33 USC § 1317):

1. Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. 33 C.F.R § 323.4(a)(1)(ii) notes that the activity must be part of an established operation. However, if an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a Section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation." 33 C.F.R § 323.4(a)(1)(ii).
2. Maintenance of serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, ridge abutments, and transportation structures. (33 U.S.C § 1344 notes that the projects must not have "changed the character, scope or size of the original fill design."). In addition, this only applies to structures affecting non-tidal waters of a stream that is located above the headwaters. United States v. Zanger, 767 F. Supp. 1030 (N.D. Cal. 1991).
3. Construction or maintenance of farm or stock ponds, or maintenance or construction of drainage ditches or irrigation ditches. 33 C.F.R § 323.4(a)(3) notes that discharges resulting from siphons, pumps or similar devices are also exempt only if these devices are related to irrigation ditches.
4. Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into navigable waters. 33 C.F.R § 323.4(a)(4) provides that the term construction site refers to any site where buildings, roads and other discrete structures are being erected or where excavation activities are taking place resulting in the runoff of sediment controlled through the use of temporary sedimentation basins.
5. Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment. Such roads must be constructed and maintained in accordance with best management practices to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States is not reduced, and any impact on aquatic environment will be minimized. 33 C.F.R § 323.4(a)(6). In addition, the roads shall be held to the minimum feasible number, width and total length consistent with the purpose of specific farming, silvicultural or mining operation and local topographic and climatic conditions. In addition, the roads must be located sufficiently far from streams. 33 C.F.R § 323.4(a)(6)(ii).
6. Any activities resulting from State approved programs under section 1288(b)(4) of title 33 which meets the requirements of subparagraph (B) and (c) of such section. Section 1288(b)(4) lists programs such programs which control the discharge or other placement of dredged material into navigable waters including an identification and management process; a consultation process; process overseeing that best management practices that comply with section 1344(b)(1) guidelines, a process which is to assure that best management practices can be terminated if not complying, and a process assuring coordination between Federal and State water related planning. 33 USC § 1288(b)(4)(A)-(B)(i)-(v).

E. Small Landowners

The Corps allows small landowners a certain amount of flexibility when applying for a Section 404 dredge or fill permit. The flexibility provided comes in the way of the Corps "evaluating the permit application under the presumption that it is impractical for the applicant to locate the project on an alternative piece of property." However, in order to have the Corps presumption apply the landowner must own no more than two acres of non-tidal wetlands. 62 Fed. Reg. 31501.

F. Letters of Permission

The Letters of Permission (LOP) permitting approval process is more concise and less intrusive than most other permitting processes. The process does not require publishing of public notice, but involvement with the Fish and Wildlife agencies and a public interest evaluation is required. LOPs typically arise out of situations in which the work to be done is minor or "would not have significant individual or cumulative impacts on the environmental values, and should encounter no appreciable opposition." 33 C.F.R. § 325.2(e)(1)(i). Another situation in which LOPs may arise is where the District Engineer creates a list of LOP categories, "consults with

state and federal agencies, issues a public notice advertising the proposed list, and a 401 certification has been issued or waived and, if appropriate, a Coastal Zone Management consistency concurrence is obtained." 33 C.F.R. § 325.2(e)(1)(ii).

G. Individual Permits

33 C.F.R. § 323.3(g) defines Individual permits as "a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharges in accordance with the procedures of this part and 33 C.F.R. part 320."

The Permitting Process

In Florida, the Army Corps of Engineers permit application is a joint form with the Florida Department of Environmental Protection or the respective Water Management District. After the application is received by the Corps District Engineer, the Engineer has 15 days to review the application for completeness. 33 C.F.R. § 320.4. In making its decision to either grant or deny the Corps will take into consideration any impacts the application will present on the environment and on the public interest. 33 C.F.R. § 320.4(a)(1). The Corps has numerous factors it uses in evaluating the impacts; however, it focuses on the following four key factors: "the impact on general navigation, wetlands areas, water quality, and fish and wildlife." 33 C.F.R. § 320.4(a)(1). Unless the Corps believes that the benefits of altering a wetland outweigh the potential damage to the wetland, it will not grant a permit in which important wetlands will be altered by the permitted activity. 33 C.F.R. § 320.4(b)(2). In its consideration the Corps will use the Section 404(b)(1) guidelines. The Corps works closely with a number of agencies in the permitting process. These relationships are set out in Memoranda of Agreements. Memoranda of Agreements authorize participation and comment by other agencies such as the EPA and FWS.

Public Notice and Standards for Issuance or Denial

33 C.F.R. § 325.5(b)(1) requires that a Standard Permit must go through a public interest review procedure in which public notice is given and comments from the public are received. 33 C.F.R. § 325.2(d)(1)-(2) more specifically prescribes the procedure for the Corps District Engineer to follow for a permit application. The Engineer is allowed 15 days after receiving the application to issue public notice. An additional 15 to 30 days is then provided for the comment period. After receiving a complete application, the District Engineer has 60 days to either grant or deny the application.

In addition to the above procedures, the Corps must incorporate the EPA's 404(b)(1) guidelines. An application will be denied if it does not comply with EPA's 404(b)(1) guidelines, which are stated at 40 CFR part 230. Section 230.10(a) requires the Corps to consider whether there are any practicable alternatives to the discharge which would have a less negative impact on the aquatic ecosystem. The consideration of alternatives is to look at costs, existing technology and logistics. Alternatives must always be available for use, capable of being executed and must satisfy the project's purpose. Section 230.10(b) requires that the proposed discharge may not cause or contribute to the degradation of state water quality standards, contribute to toxic effluent standards, "jeopardize the existence of any federally listed endangered or threatened species or their critical habitat, or violate any requirement of any federal marine sanctuary." Section 231.10(c) provides that "the proposed discharge may not cause or contribute to any significant degradation of waters of the United States." 40 CFR § 230.10(c). In addition, Section 230.10(d) provides that "the proposed discharge may not be permitted unless appropriate and practicable steps are taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 CFR § 230.10(d).

Compensatory Mitigation

Individual Permits require wetland mitigation. The concept of wetland mitigation was refined by one of the more influential Memorandum of Agreements, which was signed between the Environmental Protection

Agency and the Army Corps of Engineers on March, 12,1990. This Memorandum of Agreement (MOA) establishes the policy and procedures the Corps must use in determining the type and level of mitigation necessary in demonstrating an applicant's compliance with the EPA 404(b)(1) guidelines.

After the guidelines are met, if there are any remaining unavoidable adverse impacts, compensatory mitigation is required. Any compensatory mitigation is expected to provide a minimum of one-for-one functional replacement with an appropriate degree of margin reflecting the degrees of success for the mitigation plan. Functional values, as provided by the March 12, 1990 MOA, are to be "assessed by using certain aquatic site techniques generally recognized in the field and/or the best professional judgement of Federal and State agency representatives, provided that such assessments fully consider ecological functions included in the Guidelines." An example of the techniques typically used are the Hydrogeomorphic Approach for Assessing Wetland Functions (HGM) or the Modified Wetland Rapid Assessment Procedure (MWRAP) which is more commonly used by the Corps. In addition, mitigation is expected in an area adjacent or contiguous to the proposed discharge site. If on-site compensatory mitigation is not practicable, off-site mitigation should be undertaken in the same geographic area if practicable. In only exceptional circumstances will the purchase or preservation of existing wetlands be accepted as mitigation.

Administrative Appeal Process

33 C.F.R. part 331 sets forth the administrative appeal process for the challenge of a permit denial or declined permit. Section 331.12 sets out the detail for the process, and notes that after a permit has been denied by the agency or declined by the applicant no affected party may file a legal action in the Federal Courts until a final Corps decision has been made and the appellant has exhausted all administrative remedies. It is important to distinguish between a permit denial and a declined permit. A ***Permit Denial*** is a written denial with prejudice of an individual permit application. A ***Declined Permit*** is a proffered individual permit, including a letter of permission, that an applicant has refused to accept, because he has objections to the terms and conditions therein. 33 C.F.R. § 331.2.

H. Enforcement

33 CFR part 326 describes the enforcement element of the Army Corps of Engineers jurisdiction. This Section specifically applies to those projects that construct without a permit or for those activities that are not in compliance with the issued permit. 33 CFR § 326.1. Civil penalties can be as high as $25,000 per violation. In the instance of unauthorized activities, the District Engineer is to take investigative measures in a timely manner. If a violation is found then a formal notification must be made to the responsible party and initial corrective measures will be prescribed by the District Engineer and any relevant Federal and State agencies. After the corrective measures are given, the responsible party is afforded the opportunity to submit an after-the-fact permit application to the Corps. However, if the responsible party refuses to adhere to the corrective measures or persists with the activities the District Engineer may pursue legal action. 33 CFR § 326.3. If after an inspection of a permitted activity it is found not to be in compliance with the issued permit the District Engineer and the responsible party must attempt to bring the activity into compliance. If an agreement cannot be reached the District Engineer must issue an order which is a prerequisite to legal action. Once an order is issued, the responsible party is given 30 days to adhere to the order. If the responsible party does not, the District Engineer may take legal action or suspend or revoke the permit under 33 CFR § 325.7(c) procedures.

III. Florida Wetlands Regulation

Along with the Army Corps of Engineers' permitting regulations of wetlands and other surface waters, the Florida Department of Environmental Protection and the various state Water Management Districts have adopted their own rules and regulations that applicants must follow when applying for a wetlands or other surface waters permit within the state. This portion of the outline will provide the legislative background necessary to understand how the State of Florida has evolved its laws to formulate the rules and regulations implemented

today. The outline demonstrates the importance of the wetland delineation methodology, environmental resource permitting, state programmatic general permitting and the enforcement of the regulations. In addition, it will provide a thorough description of the permitting process in the State of Florida.

A. Chapter 373 and The Water Management Districts

Chapter 373, Florida Statutes, created a broad definition of waters by stating that "waters in the state" are within the jurisdiction of the Water Management Districts. § 373.023(1), Fla. Stat. Chapter 373 also established that the purpose of the Districts is to ensure that regulated activities will not be harmful to the water resources of the District or inconsistent with the overall objectives of the District. Fla. Stat. § 373.413, 371.416, 373.426. As the Districts developed they took into consideration the hydrological uniqueness and the water resource needs of their respective regions. In addition, the Districts worked together with the Department of Environmental Protection (DEP) in providing permits and imposing reasonable and responsible conditions in the construction or alteration of stormwater and surface water management systems.

Through a number of concerted efforts between the DEP, the Water Management Districts (WMD) and the Florida Legislature, stormwater and surface water management permitting programs were integrated. This integration heightened the awareness of wetland protection within these agencies and led to the streamlining of the wetlands permitting programs. The agencies efforts led to the creation of the Florida Environmental Reorganization Act which consolidated numerous permitting processes into one. The ERP program allows for a single permit to be given by a single agency for development activities in Florida.

B. Delineation Methodologies For Wetlands and Surface Waters

In 1994, the DEP and the Water Management Districts jointly developed the Wetlands Act of 1994, which created a statewide wetlands delineation methodology. The methodology has five tests that the agencies are to use when asserting wetlands jurisdiction. The first test deals with applying the definition of wetland as provided by Rule 62-340.200(19) of the Florida Administrative Code. The second and third tests attempt to determine what percentage of the land in question has "vegetative coverage" of certain plant species. The fourth test determines whether there is evidence of "undrained hydric soil;" "improved pastures;" "pine flatwoods;" and "the presence of certain soil types." The standard of proof used for each of the tests is "reasonable scientific judgement." Once the DEP or the WMDs discover that a particular piece of land meets the test with reasonable scientific judgment, the effect of such decision makes it binding on all governmental entities for the duration of the formal determination or permit. The Wetlands Act of 1994, Ch. 94-122, Laws of Fla. § 1(20).

Wetlands Defined

Along with the methodology tests, Section 373.019(22), Florida Statutes, provides the definition of wetlands as:

> *"...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. Soil present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soils 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 adaptation, 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...mangrove swamps and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by saw palmetto." Section 373.019(22)*

C. Environmental Resource Permitting (ERP)

ERP Grandfathered Provisions

The activities listed in Sections 373.414(11)-(16) and 373.421(6) and (7), Florida Statutes, are grandfathered from the ERP program. These activities continue to be reviewed under the Management and Storage of Surface Waters program and the Wetland Resource permit program. Some of the statutory exemptions are as follows: Activities permitted under Chapters 403 and 373, Florida Statutes, prior to the adoption of the ERP rules and any non-substantial permit modifications. Fla. Stat. § 373.414(11)-(12); Certain wetland delineations identified and approved as part of a permit issued prior to the ERP rules. Fla. Stat. § 373.414(12)(b); Permits which did not identify and delineate wetlands, but were approved prior to ERP are also grandfathered from the new wetland methodology. Fla. Stat. § 373.414(12)(b); Permitted dredge and fill activities within areas subject to Jurisdictional Declaratory Statements issued prior to the ERP. Fla. Stat. § 373.414(12)(c); Jurisdictional Declaratory Statements issued in response to a petition on or before June 1, 1994. Fla. Stat. § 373.414(13); and Phosphate and Fuller's Earth Mine permits submitted prior to July 1, 1996. Fla. Stat. § 373.414(15). These grandfather provisions have specific conditions for use which are spelled out in Section 373.414, Florida Statutes.

ERP Exemptions

The ERP exemptions are found in Chapters 373 and 403, Florida Statutes. Several of the Water Management Districts also created exemptions in their rules and regulations. For example, the following activities are exempt from permitting under certain limited conditions: the installation of overhead transmission lines and support structures; installation and repair of any private dock or pier; and installation and maintenance of public boat ramps of less than 30 feet in width. Section 403.813(2)(a)-(c), Florida Statutes. In addition, the replacement or repair of existing docks and piers; restoration of seawalls; maintenance of dredged waterways and insect control structures; and repair and replacement of existing functional stormwater pipes are all exempt under Section 403.813(2)(d)-(h), Florida Statutes. The construction of private docks, seawalls and swales; installation of aids to navigation; and replacement and repair of open trestle foot bridges and vehicular bridges are also exempt. Section 403.813(2)(i)-(l), Florida Statutes. Section 403.813(m)-(n) exempts the installation, replacement or repair of subaqueous transmission and distribution lines. In addition, Section 373.406 authorizes the DEP and the WMDs to create general permits by rule and to exempt an activity that has a minimal negative impact on the District's water resources.

The DEP and the WMDs established rule exemptions that adopt the statutory exemptions. The DEP's exemptions which are predominately contained in Section 403.813, Florida Statutes are incorporated into Rules 62-312.050(1)(a)-(m) and (r)-(v) of the Florida Administrative Code. Each WMD adopted additional exemptions which are found as follows: Northwest Florida Water Management District additional exemptions are found in Rule 40A-4.501; Suwannee River Water Management District additional exemptions are found in Rule 40B-4.1070; St. Johns River Water Management District additional exemptions are found in Rule 40C-4.051; Southwest Florida Water Management District additional exemptions are found in Rule 40D-4.051; South Florida Water Management District additional exemptions are found in Rule 40E-4.051 and Rule 40E-4.0515

Conditions Necessary for the Issuance of an ERP

The environmental review of Environmental Resource Permits combine of the DEP's prior program for dredge and fill activities with the WMDs MSSW permitting program for drainage issues. The criteria can be subdivided into three different areas: water quality, water quantity, and environmental. When proposing a project that will affect surface waters the project must receive an ERP before any construction can begin. In order for the permit to be issued, certain "reasonable assurances" must be provided by the applicant. For instance, the project will not damage or harm the water resources of the District and the project will not be "inconsistent with the overall objectives of the District." In addition, reasonable assurances that the project will not cause adverse water

quantity and quality, flooding, impacts to existing surface water storage, the value of wetland functions, secondary impacts, impacts to a work of a District, and will not adversely impact the maintenance of surface or ground water levels. Fla. Admin. Code R. 40X-4.301(1)(a)-(k). However, a balance must be drawn between each criterion.

Water Quality

One of the important functions of the ERP program is to prevent violations of state water quality standards. Rule 62-302.300 states that water quality standards were adopted to protect health or welfare and to enhance the quality of waters of the State. In addition, the rule notes that the DEP will use the best environmental information available in making decisions on the effects of toxic discharge and will be encouraged to develop innovative alternatives in waste treatment that might better preserve water quality. The water quality criteria consider activities which relate to both short term and long term water quality concerns. For instance, the Basis of Review includes the following short term considerations: devices for the duration of dewatering and other construction activities adjacent to wetlands; stabilization of newly constructed slopes; proper construction access for barges and boats; proper maintenance of construction equipment; and controlling and preventing certain discharges that threaten water quality standards. Section 4.2.4.1(a)-(b), SFWMD Basis of Review for Environmental Resource Permit Applications, August 2000. The long term water quality considerations are also provided: i.e. The potential of the project violating water quality standards; long term erosion, siltation or propeller dredging that will cause turbidity violations; and prevention of the discharge of pollutants. Section 4.2.4.2(a)-(c), SFWMD Basis of Review for Environmental Resource Permit Applications, August 2000.

Water Quantity

All proposed activities for an Environmental Resource Permit must address surface water flows for both downstream and upstream flows. An important factor in determining such surface water flows is the calculation of the amount of runoff a particular project is likely to create. In the calculation, the amount of impervious area must be considered along with the volume of flow. As a result, the applicant must provide sufficient assurance to the WMD that the project provides enough protection to prevent flooding, and that the project will not cause negative impacts on water quantity, surface water and groundwater levels. As a result of the Florida Water Resource Act, the Florida Supreme Court was able to formulate the "reasonable use rule." Westland Skating Ctr. v. Machado Buick, 542 So. 2d 959 (Fla. 1989). The rule in Westland Skating provides that "the upper owner may improve and enhance the natural drainage of his land as long as he acts reasonably and does not divert the flow, and that the lower owner is subject to an easement for such flow as the upper owner is allowed to cast upon him." Id. 962. The Basis of Review and Chapter 40X-4 of the Florida Administrative Code (for each WMD) sets out the water quantity rule criteria.

The Basis of Review provides certain design criteria that a proposed surface water management system must meet. An example of these standards is the comparison of the volume of discharge after the project is complete with the volume of discharge before the project was completed. An applicant is allowed to provide reasonable assurances that these standards are met through two options: (1) criteria and standards found in the Basis of Review; or (2) alternative methods that are appropriate for the system being proposed. The Basis of Review provides that if a constructed water system (ditch, stormwater pond or canal) is expected to lower or raise the water level, duration or frequency of inundation of a wetland then reasonable assurances that the water system will not adversely impact the functions of the wetland must be given. SFWMD Basis of Review for Environmental Resource Permit Applications, August 2000 4.2.2.4(a)-(b). In addition, an applicant is required to monitor the wetland they have affected to make sure that the activity has not resulted in adverse impacts, or calibrate the system to prevent adverse impacts. SFWMD Basis of Review for Environmental Resource Permit Applications, August 2000 4.2.4(c).

The criteria found in Chapter 40X ensures that the applicant's proposed surface water system will create equal discharge flows pre and post-development. The ERP raises the standard by requiring that pre and post-development flows are measured based on the 25 year and 3 day storm analysis. An on-site drainage storage feature is usually required to deal with storage, i.e. lakes, ponds, reservoirs or wetlands. The predevelopment discharge flows are measured through a site survey that determines the flow based on the amount of project surface area that is pervious or impervious. In addition, the flow is measured through generally accepted engineering computer model programming. The rules require additional provisions and review of "specific design criteria" for surface water management systems. An ERP will be issued once the applicant can meet the specified design criteria.

Water Quantity Criteria for Basin-Specific ERP

Section 373.0693, Florida Statute, authorizes the WMDs to designate basin areas and the power to create rules for permitting programs related to basin-specific ERPs. In the Basis of Review, Water Quantity Criteria specifically related to basins has only been adopted by the St. John's River Water Management District and the South Florida Water Management District. Each basin within these Districts has its own criteria due to the differing hydrological nature of the basins.

Environmental Conditions Necessary for Issuance of An ERP

The "Environmental Conditions for Issuance" of an ERP are similar between the Districts and provide that "reasonable assurances" must be made for activities affecting surface waters. For example, there must be a "reasonable assurance" that the project will not negatively impact the habitat of certain designated fish, wildlife and listed species. Each WMD's Basis for Review provides the environmental criteria an applicant must meet to be in compliance with the necessary Environmental Conditions. These criteria are listed below:

- ***"Elimination or Reduction of Impacts"*** – Practical modifications to the proposed system will have to be made if the system will negatively impact wetlands or any other surface water system.
- ***"Wetlands Functions Provided to Fish, Wildlife, and Listed Species"*** – The general condition, the hydrology, uniqueness, location, the amount wildlife utilizes the surface water system are the factors considered in determining the wetland functions for wildlife.
- ***"Riparian Habitat Protection Zones"*** - The St. John's River Water Management District is the only WMD with such zones found in specific river basins.
- ***"Public Interest"*** –Seven factor test in determining that, with "reasonable assurance," the proposed project, depending upon the area of impact, will not be contrary or is clearly in the public interest.
- ***"Class II Waters – Approved for Shellfish Harvesting"*** – An application which will directly affect class II waters or waters in which shellfish is harvested will be denied if not in compliance with additional criteria listed in subsection 12.2.6 of the Basis of Review.
- ***"Vertical Seawalls*** "– It is the intent of the Florida Legislature to not endanger or harm estuaries or lagoons; therefore, the Legislature has proposed the use of riprap and sloping seawalls. This is an attempt to eliminate the construction of "*vertical seawalls.* " The Legislature also created several distinct exemptions to this criterion.
- ***"Secondary Impacts"*** – Within this criterion four parts are established which specifically consider impacts from "construction, alteration and intended or reasonably expected uses of a proposed system" on certain wetland functions.
- ***"Cumulative Impacts"*** – This criterion considers certain impacts which result from "development activity" and the number of impacts surrounding wetlands can sustain without violating surface water quality and negatively affecting surrounding wetlands within the same drainage basin.

- ***"Mitigation"*** – This criterion is established to allow the proposed project to balance the negative impacts of the surface water system with positive impacts. There are four types of mitigation typically considered: creation, restoration, enhancement, and preservation.
-

Some of the more heightened areas of environmental review are discussed in further detail below.

Elimination, Reduction and Minimization of Impacts

All of the WMDs, with the exception of the Northwest Florida Water Management District, have similar rules relating to the elimination, reduction and minimization of impacts on wetlands or other surface waters.

If a project is adversely impacting a wetland or other surface water then the applicant is to incorporate practicable modifications to the design of the project in order for the impacts to be eliminated, reduced or minimized. In addition, mitigation cannot be implemented until the applicant makes the necessary modifications that are practicable Section 12.2.1 of the SJRWMD Rules provides an example of what practicable modifications specifically relate to:

- The economic viability of the project which considers the value and profit of the project, investment return and costs, visual access, customer access, and the best use of the property being affected by the project.
- Whether there is a need or no other alternative to the project.
- Whether the modifications would significantly alter the type or nature of the project.
- Whether there are "alternative sites or alignments."
- Whether the modifications are "technically feasible."
- Whether the modifications will negatively affect the safety of the public.
- Whether the cost of the modification will far exceed the costs in comparison to the "environmental benefit" the modification is planned to achieve.

The applicant carries the burden of demonstrating that the modification will not be practicable.

Secondary and Cumulative Impacts

Secondary impacts were first discussed in del Campo v. DER, 452 So.2d 1004 (Fla. 1st DCA 1984). Soon after the former DEP, DER used secondary impacts in its decisions to issue dredge and fill permits. Today, the ERP has incorporated secondary impacts in its analysis as well. Cumulative impacts were statutorily created as opposed to secondary impacts that started as a creature of case law. Chapter 17-1.36 of the Florida Administrative Code sets out how cumulative impacts are to be considered. Conservancy v. A. Vernon Builders, 580 So.2d 772, 778-779 (Fla. 1st DCA 1991) outlines the distinction between secondary and cumulative impacts by stating that cumulative impacts are "impacts of similar projects which are existing, under construction, or reasonably expected in the future," whereas secondary impacts are impacts "caused or enabled by the project."

The Basis of Review sets forth the secondary impact criteria and begins by stating that "an applicant must provide reasonable assurance that a regulated activity will not cause adverse secondary impacts to the water resource." This section creates a four part criteria to address secondary impacts. The first part states that water quality standard violations or negative impacts to wetlands or other surface waters cannot occur through secondary impacts. This criteria lists presumptions related to potential impacts to wildlife and habitat such as boat traffic, propeller dredging and septic tanks. The second part of the criteria notes that a listed species ability to nest or den is not to be interrupted by negative impacts to the upland or wetlands a listed species uses. Such species are listed by the U.S Fish and Wildlife Service and the Florida Fish and Wildlife Conservation Commission. These agencies consider species that are endangered, threatened or are species of special concern. The third part of the criteria states that impacts to historical and archeological areas cannot be disturbed by

secondary impacts. The final part to the criteria states that reasonable assurances must be given to determine that activities involving the expansion of a project's plans will not cause violations to water quality standards or negative impacts to wetlands or other surface waters. The agency will consider expected and intended uses of the project, and applicants are directed to eliminate all future impacts in the design of their projects. Section 4.2.7(a)-(d) SFWMD Basis of Review for Environmental Resource Permit Applications, August 2000.

Section 373.414(8), Florida Statutes, sets out the cumulative impact criteria, which considers the impacts upon surface water and wetlands. This section states as follows:

> The governing board or the department, in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the cumulative impacts upon surface waters and wetlands, as delineated in s. 373.421(1), within the same drainage basin as...:
>
> (a) The activity for which the permit is sought.
> (b) Projects which are existing or activities regulated under this part which are under construction or projects for which permits or determinations pursuant to s. 373.421 or s. 403.914 have been sought.
> (c) Activities which are under review, approved, or vested pursuant to s. 380.06, or other activities regulated under this part which may reasonably be expected to be located within surface waters or wetlands, as delineated in s. 373.421(1), in the same drainage basin as defined in s. 373.403(9), based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations.

In addition to Section 373.414(8), Florida Statutes, a number of rules were also adopted addressing cumulative impacts. The Basis of Review requires that an applicant provide reasonable assurances that the proposed activity will not cause unacceptable cumulative impacts within the same drainage basin as the proposed activity. Another applicable provision states that if the proposed project would cause a violation of state water quality standards within the same drainage basin then the cumulative impact is considered unacceptable. A final provision states that an applicant may propose preventive measures to prevent cumulative impacts, such as preservation.

D. The Institutional Criteria of ERP

Operation and Maintenance Criteria

Each WMD has created specific rules and regulations related to the institutional aspects of operating and maintaining surface water systems. These rules differ between the Districts to fit the needs of each jurisdiction and are set out in different chapters of the Florida Administrative Code. The WMDs typically require information related to the operation and maintenance of the surface water management systems. The information typically requested relates to: (1) the entity that will be involved in the operation and maintenance aspects of the system; (2) the requirements to move the ERP from the construction phase to the operation phase; (3) the finances involved in mitigation; and (4) the conservation easements. The entity responsible ultimately for maintaining and operating the system after the permit issuance must have the financial capabilities to maintain and operate the system and the legal obligation to control segments of the surface water system. Along with these responsibilities, the ERP rules additionally state that the entity must also demonstrate that it has the administrative capabilities to perform routine operation and maintenance of the system and the conservation areas.

E. Northwest Florida Water Management District

The Northwest Florida Water Management District is the only District that is exempted from implementing the ERP program. As a result, the District only regulates agricultural and forestry use of water and safety at impoundment sites. Fla. Admin. Code R. 40A-4 and 40A-44. The dredge and fill permitting program

and the stormwater program for the District is administered by the DEP. By July 1, 2003, the DEP and the District are to create an ERP implementation program that will address the divisions between the two agencies, the manner in which wetlands are to be delineated, the application of certain federal programs, and the use of the Private Property Rights Protection Act found in section 70.01, Florida Statutes. The final report for the program is due to the Governor and members of the Florida Legislature on March 1, 2003.

F. Division of Permitting Responsibility

The DEP and the WMDs are responsible for administering the regulatory programs in Chapter 373, Part IV. Their responsibilities are outlined in operating agreements, which are designed to promote permit streamlining and more efficient governance.

Similar Operating Agreements: DEP and the SRWMD, SJRWMD, SWFWMD and the SFWMD.

The operating agreements between the DEP and the SRWMD, SJRWMD, SWFWMD, SFWMD allow for the DEP to take final agency action and review all permit applications and petitions for variances or waivers for: Chapter 403 permits related to solid waste management facilities; Chapter 403 permits related to hazardous waste facilities; Chapter 403 permits related to residential and industrial wastewater treatment facilities; Mining projects; Facilities related to the production and transmission of electrical power plants; Cables and lines for communication transmission; Single-family dwelling units; Facilities related to natural gas and petroleum; and Structures and facilities related to docking and boating in general.

For any activities not listed above, it is the responsibility of the SRWMD, SJRWMD, SWFWMD or SFWMD to take final agency action and review permit applications and petitions for variances and waivers. In addition, petitions for formal determination of wetlands or other surface waters are administered by the DEP. The DEP will take on this responsibility only if the petitions are filed by entities that are undertaking activities the DEP has permitting responsibility for under the operating agreements. In all other petitions, the SRWMD, SJRWMD, SWFWMD and SFWMD will take final agency action and review for formal determinations.

In regard to permit applications for mitigation banks, the DEP will only take final agency action and review when the permit application is filed by certain specific entities. For example, mining entities that propose a mitigation bank to offset impacts of their mining activities for which DEP has responsibility for permitting. In addition, the DEP will take final agency action and review all permit applications for mitigation banks located in the SRWMD. The SJRWMD, SWFWMD and SFWMD take final agency action on mitigation banks in their districts. The agency that issues the permit will have the responsibility to monitor compliance with the permit. In addition, if a different agency from the issuing agency modifies the permit then the modifying agency is responsible for monitoring compliance with the permit.

Other Operating Agreements: DEP and NWFWMD

As previously stated, the NWFWMD has not adopted the ERP program. As a result, Chapter 62-312 of the Florida Administrative Code which sets out the Wetlands Resource Permitting program is still applied by the DEP in this jurisdiction. The DEP has the power in this District to fully enforce the WRP program, review petitions, formally determine wetlands or other surface waters, take final agency action, and review all mitigation bank applications.

G. State Programmatic General Permit

The State of Florida has been delegated a State Programmatic General Permit (SPGP) by the Corps. This general permit program concerns only minimal work in waters of the U.S., both navigable and non-navigable. The SPGP is applicable to all of Florida's counties with the exception of Monroe County and those counties within the jurisdiction of the Northwest Florida Water Management District. The SPGP is applicable to activities associated

with dock facilities, structures and general boating activities. When an application for the SPGP is submitted, DEP has the authority to review the application and then place the application into one of three distinct categories – green, yellow or red. If the DEP believes the application falls into the green category then it does not need any further action by the Corps or other agencies. An application placed into the yellow category will require a meeting with the Corps and with any federal agencies that feel it necessary to review the application further. After the federal agencies review the application if the concerns of the agency cannot be properly addressed then the application will move to the red category.

H. Enforcement and Compliance

The WMD has the duty to ensure compliance with a permit. This post permit period is the period in which the WMDs make sure that the project's construction and operation remain consistent with the permit conditions and do not violate any of the regulatory criteria throughout the duration of the project. The WMDs oversee the project by gathering data and analysis, gathering reports on the project, and carrying out on-site inspections. Chapter 373, Part IV sets forth the compliance requirements and penalties. For instance, upon a written request for inspection the entity is required to respond in writing, if the entity does not then the WMD has the authority to revoke the permit and immediate entry on to the land is allowed if the WMD has the belief that the safety of human health or welfare is in jeopardy. Fla. Stat. § 373.423(3). The extent of the penalties can go as far as a third degree felony which is punishable with up to 5 years in prison and a $50,000 fine. Section 373.430 sets forth the acts which constitute violations of this part. Section 373.129, Florida Statutes, provides that a WMD may maintain a civil action against a violator. This section also provides for the recovery of civil penalties of up to $10,000 a day for each individual offense, recovery of investigative costs, attorney's fees, and restoration or corrective action. In addition, Section 373.136, Florida Statutes, provides that a WMD has the power to use both temporary and permanent injunctive relief. Procedurally, the WMDs attempt to resolve potential disputes prior to litigation. In this process there are tools a WMD may use: (1) a Notice of Investigation, (2) a Notice of Violation, (3) a letter in Aid of Settlement, and (4) a draft Consent Agreement. If a Consent Agreement cannot be reached then the WMD will more than likely pursue the situation through the use of administrative or judicial enforcement. Section 373.911, Florida Statute, provides the guidelines for the administrative process. This section states that the Executive Director will serve an administrative complaint setting forth the violations or potential violations of an entity. If the named entity does not attempt to schedule an administrative hearing then the complaint automatically becomes a final order. However, if the Executive Director chooses to pursue the action through a judicial enforcement action then it will be in Circuit Court and the Florida Rules of Civil Procedure will apply.

IV. Conclusion

The various state and federal agencies have compiled numerous rules and regulations for the protection and survival of our nation's wetlands and other surface waters. Throughout the years both state and federal legislators have enacted statutes distributing the power for such regulation to the applicable agencies discussed herein. As this outline has discussed, the Army Corps of Engineers has been given the primary federal authority for implementing and enforcing rules and regulations pertinent to wetlands and other surface waters. The outline has also provided a brief review of the Clean Water Act Section 404 permitting process and the River and Harbors Act Section 10 permitting process.

This outline also provided a depiction of the State permitting processes. In Florida, the DEP and WMDs have implemented the wetland delineation methodology rule, an environmental resource permitting program and a state programmatic general permit in order to prevent adverse impacts to the state's wetlands and other surface waters. The overlap of the state and federal wetland permitting process is a challenge that must be overcome as part of any project planning for development in Florida. This outline provides only a brief summary of some of these issues and should not be used as a comprehensive listing of all the considerations.