

Development in Florida: Overview of Federal and State Environmental Statutes

Real Property Certification Review Course
2022

Frederick L. Aschauer, Jr.

Lewis, Longman & Walker, P.A.



New Development in Florida

Federal Permits

Wetland Impacts (Dredge & Fill)

- Permits for Dredge or Fill Material - 33 U.S.C. § 1344 (“Section 404” permits) - permitting authority delegated to ACOE; Rivers and Harbors Act of 1890
- 40 C.F.R. § 120.2 - as of Apr. 2020 revision 85 Fed. Reg. 22250-01.
 - Waters of the U.S. (“WOTUS”)

Species Impacts

- Endangered Species Act
- Bald Eagle (Bald & Golden Eagle Protection Act)

Use-dependent Permits

- Depending on intended use
 - Clean Air Act
 - Resource Conservation and Recovery Act



New Development in Florida

State Permits

Wetland Impacts/Stormwater Drainage

- Environmental Resource Permit
 - Issued by Florida Department of Environmental Protection or Water Management District

Species Impacts

- State Endangered Species Permit (e.g. Gopher tortoise)

Coastal-specific Impacts

- Coastal Construction Control Line
 - <https://ca.dep.state.fl.us/mapdirect/?webmap=a8c9e92fbad5446d987a8dd4ee5dc5cc>
- Joint Coastal Permit
- Mangrove Trimming Permit



Redevelopment with Contamination Issues

Brownfields Redevelopment Act - §§ 376.77-376.85, Fla. Stat.

- Gives local governments the authority to establish brownfield areas.
 - “‘Brownfield sites’ means real property, the expansion, redevelopment, or reuse of which may be complicated by actual or perceived environmental contamination.” § 376.79(4), Fla. Stat.
- Must enter into a brownfield site rehabilitation agreement. § 376.80, Fla. Stat.

Voluntary Cleanup Tax Credits - § 376.30781, Fla. Stat.

- Encourages participants to conduct voluntary cleanup of certain drycleaning solvent contaminated sites and brownfield sites in designated brownfield areas.



Brownfields Redevelopment Act

§§ 376.77-376.85, Fla. Stat.

What are Brownfields?

- ▶ The Act gives local governments the authority to establish brownfield areas.
- ▶ “‘Brownfield sites’ means real property, the expansion, redevelopment, or reuse of which may be complicated by actual or perceived environmental contamination.” § 376.79(4), Fla. Stat.



Brownfields Redevelopment Act

Primary goals of the Act:

- ▶ reduce health and environmental hazards on existing commercial and industrial sites that are abandoned or underused due to these hazards.
- ▶ create financial and regulatory incentives to encourage redevelopment and voluntary cleanup of contaminated properties



Where are Brownfields Located?

- ▶ <https://ca.dep.state.fl.us/mapdirect/?focus=brnfls>



Key Provisions of the Act

- ▶ Liability Protection
 - ▶ For the person responsible for site rehabilitation - § 376.82(2), Fla. Stat.
 - ▶ Lender protection - § 376.82(4), Fla. Stat.
- ▶ Financial Incentives
 - ▶ Voluntary Cleanup Tax Credits - § 376.3078, Fla. Stat.
 - ▶ Loan Guarantees
 - ▶ Job Creation Refund - § 288.107(2)(a),(b), Fla. Stat.
 - ▶ Sales Tax Refunds - § 288.107(4), Fla. Stat.; § 212.08, Fla. Stat. (refund on building materials)



Voluntary Cleanup Tax Credits

- ▶ Encourages participants to conduct voluntary cleanup of certain drycleaning solvent contaminated sites and brownfield sites in designated brownfield areas.
- ▶ Key Components
 - ▶ Upon execution of a Brownfield Site Rehabilitation Agreement by Person Responsible for Brownfield Site Rehabilitation (PRFBSR), entitled to recover 50% of actual cleanup costs up to \$500,000.
 - ▶ Upon completing site rehabilitation, eligible for an additional 25% of actual clean up costs.
 - ▶ If redevelopment is for certain purposes, such as healthcare facilities or affordable housing, entitled to recover additional 25% of actual clean up costs.
 - ▶ Eligible costs include attorney's fees, environmental assessment costs, materials, and labor.
 - ▶ Costs are reimbursed in the form of corporate income tax credits, which are then either used by the developer or sold on the secondary market.

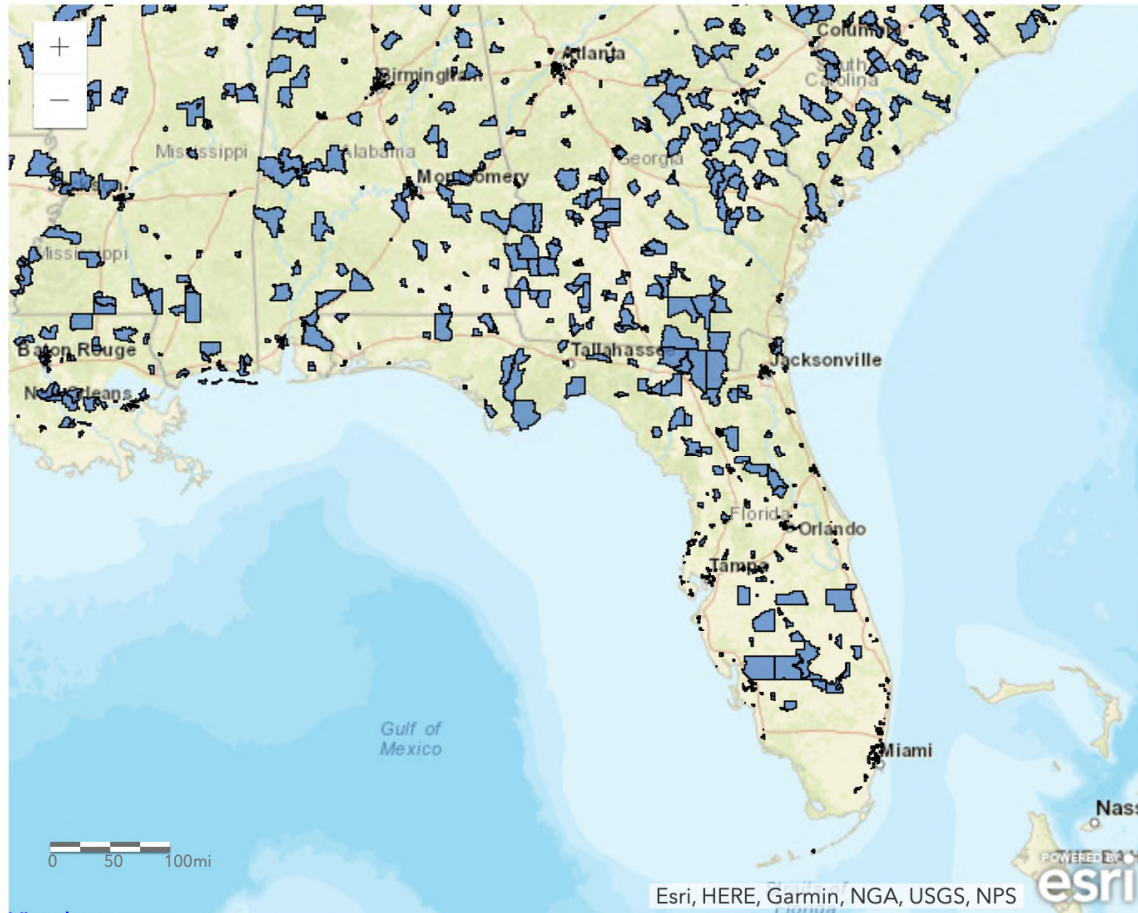


Opportunity Zones

- ▶ Opportunity Zones are designed to encourage economic growth and investment in certain population census tracts designated by state and local governments.
- ▶ The primary benefits of the program are:
 - ▶ A deferral of tax on an item of capital gain that is reinvested in an Opportunity Zone Fund - the tax on the original capital gain can be deferred until 2026;
 - ▶ A basis step-up of up to 15% on the original capital gain; and
 - ▶ The ability to avoid paying any tax on capital gains from the sale or exchange of any Opportunity Zone investments held for 10 years or more.



Florida Opportunity Zone Map



[View larger map](#)

Federal Environmental Statutes

NEPA

National Environmental Policy Act (NEPA) - 42 U.S.C. § 4321 *et seq.*:

- NEPA requires federal agencies to assess the environmental effects of proposed major Federal actions.
- Agency prepares an environmental assessment (EA) of proposed action → either Finding of No Significant Impact (FONSI) or prepares an Environmental Impact Statement (EIS)
 - ACOE NEPA regulations: 32 C.F.R. 651
 - EPA NEPA regulations: 40 C.F.R. 6





What's that burning?

Photo from the Cleveland Press Collections, courtesy of the Michael Schwartz Library Special Collections, Cleveland State University. ClevelandMemory.org.



Federal Environmental Statutes

CWA

Clean Water Act (CWA) - 33 U.S.C. § 1251 *et seq.*

- Objective: “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a)
- National Pollutant Discharge Elimination System (NPDES) - 33 U.S.C. § 1342 - established permitting program for stationary sources
- Water Quality Standards - 33 U.S.C. § 1313 - 3 components: designated uses, criteria to protect those uses, and an antidegradation policy



Army Corps Jurisdiction

CWA continued:

- Waters of the United States (“WOTUS”)
 - Original definition included “interstate wetlands” and “wetlands adjacent to” jurisdictional waters.
 - *Rapanos v. U.S.*, 547 U.S. 715 (2006) - Justice Kennedy’s “significant nexus” test and Justice Scalia’s “relatively permanent” + “continuous connection” test
- Obama Administration
 - 2015 “Clean Water Rule” defined WOTUS J. Kennedy’s test
- Trump Administration
 - Feb. 28, 2017 Executive Order directed EPA to rescind or replace 2015 Rule
 - 2019 “Navigable Waters Protection Rule” defined WOTUS under the CWA to reflect J. Scalia’s plurality opinion in *Rapanos*



Pascua Yaqui Tribe v. EPA,
No. CV-20-00266 (D. Ariz. Aug. 2021).

Holding: Vacatur of Trump's 2019 WOTUS rule (NWPR)

Effect?

- EPA/USACE now interpreting WOTUS consistent with pre-2015 regulatory regime (J. Kennedy's concurrence)
- Agencies halting implementation of 2019 WOTUS rule (NWPR) nationwide



Waters subject to CWA jurisdiction (EPA interpretation after *Pascua Yaqui Tribe*)

- ▶ “The agencies are interpreting ‘waters of the United States’ consistent with the pre-2015 regulatory regime until further notice.”
- ▶ The term waters of the United States means:
 - ▶ 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;
 - ▶ All interstate waters including interstate wetlands;
 - ▶ 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 . . .



Agency guidance on “significant nexus”

▶ Jurisdictional waters:

- ▶ Traditional navigable waters
- ▶ Wetlands adjacent to traditional navigable waters
- ▶ Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g ., typically three months)
- ▶ Wetlands that directly abut such tributaries

▶ Those requiring a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water

- ▶ Non-navigable tributaries that are not relatively permanent
- ▶ Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- ▶ Wetlands adjacent to but that do not directly abut a relatively permanent nonnavigable tributary

▶ Waters that are NOT jurisdictional:

- ▶ Swales or erosional features (e .g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- ▶ Ditches (including roadside ditches) excavated wholly in and draining only
- ▶ uplands and that do not carry a relatively permanent flow of water waters of the United States.



President Biden's Proposed Rule

- ▶ EPA proposed new “WOTUS” definition in December 2021 that would return WOTUS to pre-2015 definition with amendments
 - ▶ Notice of Proposed Rule Published in Federal Register on December 7, 2021
- ▶ In the meantime?
 - ▶ Florida has announced it intends to continue implementing the NWPR in making “jurisdictional determinations” for the next year
 - ▶ 40 CFR 233.16(b), Procedures for Revision of State Programs
 - ▶ Creates uncertainty for permits issued during that time in FL



What are the Federal Circuit Court's Doing?

Court	Standard
1 st Circuit	Either Plurality or Kennedy
3 rd Circuit	Either Plurality or Kennedy
4 th Circuit	Applied Kennedy based on parties' agreement
5 th Circuit	Applied all 3 standards without deciding
6 th Circuit	Applied Plurality and Kennedy without deciding
7 th Circuit	Kennedy
8 th Circuit	Either Plurality or Kennedy
9 th Circuit	Kennedy
11 th Circuit	Kennedy



SCOTUS Takes Up New Case on WOTUS

- ▶ On January 24, 2022, the Supreme Court of the United States granted certiorari in *Sackett v. EPA*
- ▶ **Issue:** Whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U. S. C. §1362(7).
- ▶ **Background:** Idaho couple wants to build a home near Priest Lake, Idaho, but EPA told them that construction violated the Clean Water Act because their lot contained wetlands that qualify as "navigable waters" regulated by the act. In 2012, the Supreme Court unanimously agreed that the Sacketts could immediately litigate their challenge to the EPA's order in federal court.
- ▶ The couple returned to the Court asking the justices to revisit *Rapanos*. The Sacketts want the Court adopt the test proposed by a four-justice plurality (J. Scalia's test), that would allow wetlands to be regulated only when they themselves have a continuous surface water connection to regulated waters.



Federal Environmental Statutes

CAA

Clean Air Act - 42 U.S.C. § 7401 *et seq.*

- Regulates air emissions from stationary and mobile sources
- Regulation of Hazardous Air Pollutants - 42 U.S.C. § 7412



Federal Environmental Statutes

CERCLA

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

- 42 U.S.C. § 9601 *et seq.*: creates a federal “superfund” program
 - Strict liability for damages, clean up, of uncontrolled hazardous waste sites
 - 42 U.S.C. § 9607
 - “Responsible parties” can include past/present site (property) owners, operators, arrangers, transporters and generators of hazardous substances
- Sets reportable release quantities for various classifications of pollutants - e.g. 40 C.F.R. § 302.4



Federal Environmental Statutes

CERCLA

CERCLA continued

- “all appropriate inquiries” rule - 40 C.F.R. § 312.20
 - Basis for Phase 1 environmental assessments
- Required under 42 U.S.C. § 9607 to avoid liability for contaminated site under “innocent landowner,” “bona fide prospective purchaser,” or “contiguous property owner” defenses.



Federal Environmental Statutes

RCRA

Resource Conservation and Recovery Act (RCRA) - 42 U.S.C. § 6901 *et seq.*

- Gives EPA authority to control hazardous waste as well as non-hazardous and solid wastes. “Cradle to grave” concept for hazardous waste management, 40 C.F.R. Part 262
 - Regulates storage, handling, transportation and disposal of hazardous waste
- Underground storage tanks releases and notification - 42 U.S.C. § 6991a



Federal Environmental Statutes

Other notable environmental statutes:

- Endangered Species Act - 16 U.S.C. § 1531 *et seq.*
- Toxic Substances Control Act - 15 U.S.C. § 2601 *et seq.*
 - Regulation of chemicals manufactured or imported into the U.S.
- Safe Drinking Water Act - 42 U.S.C. § 300f *et seq.*



Florida Environmental Statutes

Chapter 161 - Beach and Shore Preservation - “It is, therefore, the intent of the Legislature that the most sensitive portion of the coastal area shall be managed through the imposition of strict construction standards in order to minimize damage to the natural environment, private property, and life.”

- Coastal construction permits - § 161.041, Fla. Stat.
- Coastal construction control lines - §§ 161.053, 161.141, Fla. Stat.
 - Line of regulation not prohibition



Florida Environmental Statutes

Chapter 373 - Water Resources - primary statutory authority for the 5 water management districts

- Consumptive use permitting - §§ 373.203 - 373.250, Fla. Stat.
- Management and Storage of Surface Waters (formerly MSSW/ dredge and fill permitting; now environmental resource permits (ERP)) - §§ 373.403 - 373.468, Fla. Stat.
 - § 373.019(25) - wetlands definition - “those areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. ...”
- Overlaps with but not always identical to federal jurisdiction.



Florida Environmental Statutes

Chapter 376 - Pollution Discharge and Removal

- Prohibits the discharge of pollutants (in excess of minimum thresholds established by rule) onto Florida lands or into Florida waters - § 376.302, Fla. Stat.
 - Regulates hazardous wastes and petroleum products
 - Primarily deals with soil and groundwater pollution (e.g. dry cleaner solvents, golf courses, etc.)
- Contamination notification requirements; during site rehabilitation - § 376.30702, Fla. Stat.
- Establishes the process by which contaminated sites are cleaned up.
 - Chapter 62-780, Fla. Admin. Code



Florida Environmental Statutes

Chapter 376 - Pollution Discharge Prevention and Removal

- Recent updates regarding liability under the Water Quality Assurance Act (WQAA) Fla. Stat. §§ 376.30 - 376.317
 - *Lieupo v. Simon's Trucking, Inc.*, 286 So. 3d 143 (Fla. 2019)
 - In 2019, Florida Supreme Court receded from its prior precedent and expanded damages to include personal injuries under section 376.313
 - *Irizarry v. Orlando Utility Commission*, 393 F.Supp.3d 1110 (M.D. Fla. 2019)
 - In 2019, federal district court expanded the scope of what constitutes a “discharge” to include “disseminating, spreading, grading, excavating” dirt



Florida Environmental Statutes

Chapter 403 - Environmental Control

- Public Notification of Pollution - § 403.077, Fla. Stat.
 - Following the passage, and then defeat, of rules requiring public notification.
- Cause of action for citizens against government to enforce environmental laws, and against private entities to stop violation of environmental laws- § 403.412, Fla. Stat. Provides attorneys' fees to prevailing party under certain circumstances.
- Mangrove protection - § 403.9321 *et seq.*, Fla. Stat.
- § 403.727, Fla. Stat. - Florida “superfund” statute



Questions?

Contact Info:

Frederick L. Aschauer, Jr.
Tallahassee, Florida
faschauer@llw-law.com
(850) 222-5702

