

Environmental Regulations: Audits and Permits

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Outline

- ▶ Environmental Audits
 - ▶ Liability
 - ▶ Defenses to Liability
- ▶ Environmental Permitting
 - ▶ State & Federal Permits
 - ▶ Species Considerations
 - ▶ Coastal-specific considerations
- ▶ Brownfields



Environmental Audits

All Appropriate Inquires - the road to a Phase I



Liability for Cleaning up Contaminated Sites

42 U.S. Code § 9607 - Liability

- ▶ “... the owner and operator of a ... facility ... shall be liable for” 42 U.S.C. § 9607(a)
 - ▶ **(A)**all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
 - ▶ **(B)**any other necessary costs of response incurred by any other person consistent with the national contingency plan;
 - ▶ **(C)**damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
 - ▶ **(D)**the costs of any health assessment or health effects study carried out under section 9604(i) of this title.



Liability for Cleaning up Contaminated Sites

- ▶ “... the owner and operator of a ... facility ... shall be liable for” 42 U.S.C. § 9607(a)
- ▶ The term “facility” means ... any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located” 42 U.S.C. § 9601



Defenses to Liability

► Pursuant to 42 U.S.C. 9607(b):

There shall be no liability [for] ... the release or threat of release of a hazardous substance and the damages resulting therefrom [if they] were caused solely by—

...

an act or omission of a third party ... with a **CONTRACTUAL RELATIONSHIP** ..., if the defendant establishes ... that (a) he exercised due care ..., and (b) he took precautions against foreseeable acts or omissions ...



Defenses to Liability

(35)(A) The term “contractual relationship”, for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession ...



Defenses to Liability

► Pursuant to 42 U.S.C. 9607(b):

There shall be no liability [for] ... the release or threat of release of a hazardous substance and the damages resulting therefrom [if they] were caused solely by—

...

an act or omission of a third party ... with a ~~CONTRACTUAL~~ **RELATIONSHIP** [land contracts, deeds, easements, leases, or other instruments transferring title or possession]..., if the defendant establishes ... that (a) he exercised due care ..., and (b) he took precautions against foreseeable acts or omissions ...



Defenses to Liability cont'd

▶ 9601(35) continued

At the time the defendant acquired the facility the defendant did not know and had **no reason to know** that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

...



Defenses to Liability cont'd

▶ 9601(35) continued

(B) REASON TO KNOW.—

(i) ALL APPROPRIATE INQUIRIES.—To establish that the defendant had **no reason to know** of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that—

(l) on or before the date on which the defendant acquired the facility, the defendant carried out **all appropriate inquiries ...**



Defenses to Liability cont'd

- ▶ 40 C.F.R. §312.20 - All appropriate inquires
- ▶ From the US EPA's FAQ sheet - *All Appropriate Inquiries Final Rule*:
 - ▶ The AAI final rule provides that the current versions of ASTM International Standard E1527-21 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" and E2247 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property" are consistent with the requirements of the final rule and can be used to satisfy the statutory requirements for conducting AAI.



Environmental Permits

Let's get the project permitted!





What's that burning?

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



Environmental Permitting Federal

- ▶ **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
- ▶ **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

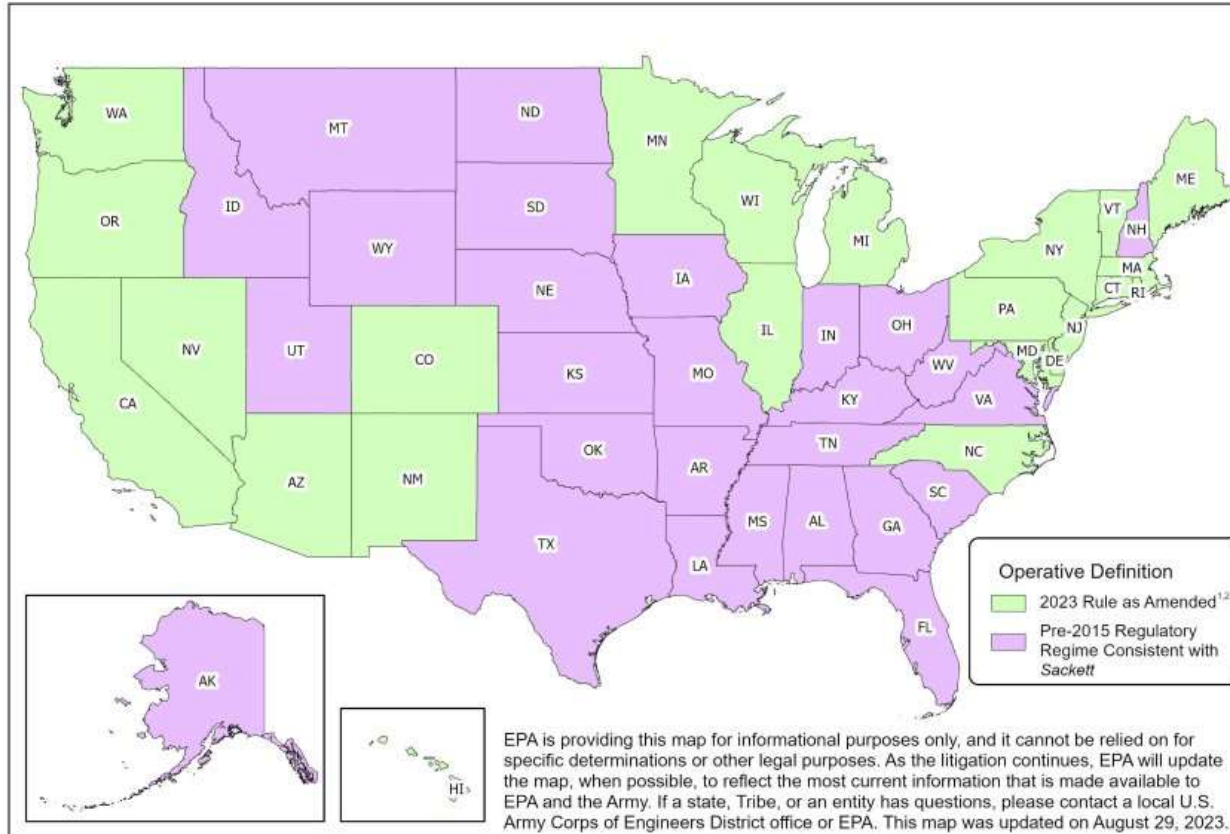


Section 404 and its “(b)(1) guidelines”

- ▶ Section 404 of the Clean Water Act (codified at 33 U.S.C. § 1344) established a permit program for discharges of “dredge or fill material” into the “navigable waters”
 - ▶ “Navigable waters” are defined “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362.
 - ▶ “Waters of the United States” are defined in rule, at 40 C.F.R. § 122.2.
 - ▶ Responsive to United States Supreme Court decision in *Sackett*



Operative Definition of "Waters of the United States"



¹Also operative in the U.S. territories and the District of Columbia

²The pre-2015 regulatory regime implemented consistent with *Sackett* is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in *Kentucky Chamber of Commerce, et al. v. EPA* (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce).



Environmental Permitting State

- ▶ Wetland Impacts/Stormwater Drainage
 - Environmental Resource Permit - 373
- ▶ Species Considerations
 - State Endangered Species Permit (e.g. Gopher tortoise)
- ▶ Coastal-specific Considerations
 - Coastal Construction Control Line
 - Mangrove Trimming Permit - § 403.9321 *et seq.*, Fla. Stat.



Environmental Resource Permits Statute

- ▶ Pursuant to § 373.414, Florida Statutes, an “activity regulated under this part ... in, on, or over surface waters or wetlands” must be permitted for it to be lawful.
 - ▶ We call these permits Environmental Resource Permits or ERPs.
 - ▶ They can be issued by the Florida Department of Environmental Protection, a Water Management District or a locally delegated program (e.g. Hillsborough County)



ERPs - Statute

- ▶ (a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:
 - ▶ 1. Whether the activity will adversely affect **the public health, safety, or welfare or the property of others**;
 - ▶ 2. Whether the activity will adversely affect **the conservation of fish and wildlife, including endangered or threatened species, or their habitats**;
 - ▶ 3. Whether the activity will adversely affect **navigation or the flow of water or cause harmful erosion or shoaling**;
 - ▶ 4. Whether the activity will adversely affect **the fishing or recreational values or marine productivity in the vicinity of the activity**;
 - ▶ 5. Whether the activity will be of a **temporary or permanent nature**;
 - ▶ 6. Whether the activity will **adversely affect or will enhance significant historical and archaeological resources** under the provisions of s. 267.061; and
 - ▶ 7. The **current condition and relative value of functions** being performed by areas affected by the proposed activity.



Environmental Resource Permits Regulations

- ▶ ERPs are issued consistent with the regulations in Ch. 62-330, Florida Administrative Code
 - ▶ 62-330.301, FAC
 - ▶ Water quantity impacts to receiving waters or adjacent lands
 - ▶ Flooding to on-site or off-site property
 - ▶ Will not violate water quality standards
 - ▶ Will not impact MFLS
 - ▶ Will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed



ERP Exemptions

- ▶ A permit is not required for:
 - ▶ The installation and repair of mooring pilings and dolphins associated with private docking facilities or piers and the installation of private docks, piers, and recreational docking facilities (with limitations e.g. under 1,000 square feet)
 - ▶ The replacement or repair of existing docks and piers
 - ▶ The restoration of seawalls at their previous locations or upland of, or within 18 inches waterward of, their previous locations.
- ▶ Rule 62-330.051, FAC, also lists several exemptions



Examples of ERPs



Environmental Permitting State - 404 Program

- ▶ Pursuant to Section 404(g) of the Clean Water Act, 33 U.S.C. § 1344(g), a state, like Florida, may assume the Federal 404 program.
 - ▶ On December 22, 2020, Florida assumed 404.
- ▶ In addition to all the conditions to get an ERP, a 404 applicant must:
 - ▶ Demonstrate there is no other practicable alternative (LEDPA)
 - ▶ Demonstrate the project will not significantly adversely affect the aesthetics of the aquatic ecosystems.
 - ▶ Demonstrate that the project will not jeopardize a threatened or endangered species.



BREAKING NEWS



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

v.

MICHAEL S. REGAN, *et al.*,

Defendants.

Civil Action No. 21-119 (RDM)

ORDER

For the reasons explained in the Court's memorandum opinion, Dkt. 163, it is hereby **ORDERED** that Plaintiffs' motion for summary judgment, Dkt. 98, is **GRANTED** with respect to Counts 3, 4, 6, and 10–13 of Plaintiffs' amended complaint, Dkt. 77. The Federal Defendants' cross-motion for summary judgment, Dkt. 99, and Defendant-Intervenors' cross-motion for summary judgment, Dkt. 102, are hereby **DENIED** as to those same Counts; and

It is further **ORDERED** that the programmatic biological opinion and incidental take statement are **VACATED**. It is also **ORDERED** that the EPA's approval of Florida's application to assume authority to issue permits under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, is hereby **VACATED**. The Court will, however, permit Defendants to seek a limited stay of the Court's order vacating the assumption decision within ten days of this order, as explained in the Court's memorandum opinion, but, unless and until such a limited stay issues, the State is without any authority to issue a Section 404 permit, and all Section 404 permitting authority in the State of Florida is vested in the Army Corps of Engineers;

On February 15, 2024, the US District Court for the District of Columbia VACATED the BiOP and the ITP for Florida's 404 Program.

The Defendants, EPA, USFWS, USACE, NMFS, officials from the agencies and FDEP have ten days to seek a limited stay.



Environmental Permitting State - 404 Program

- ▶ Pursuant to Section 404(g) of the Clean Water Act, 33 U.S.C. § 1344(g), a state may develop a State 404 program.

- ▶ On December 1, 2009, the EPA approved the State 404 program.

- ▶ In addition to the State 404 program, a 404 applicant must:

- ▶ Demonstrate that the project will not have a significant adverse effect (LEDPA)

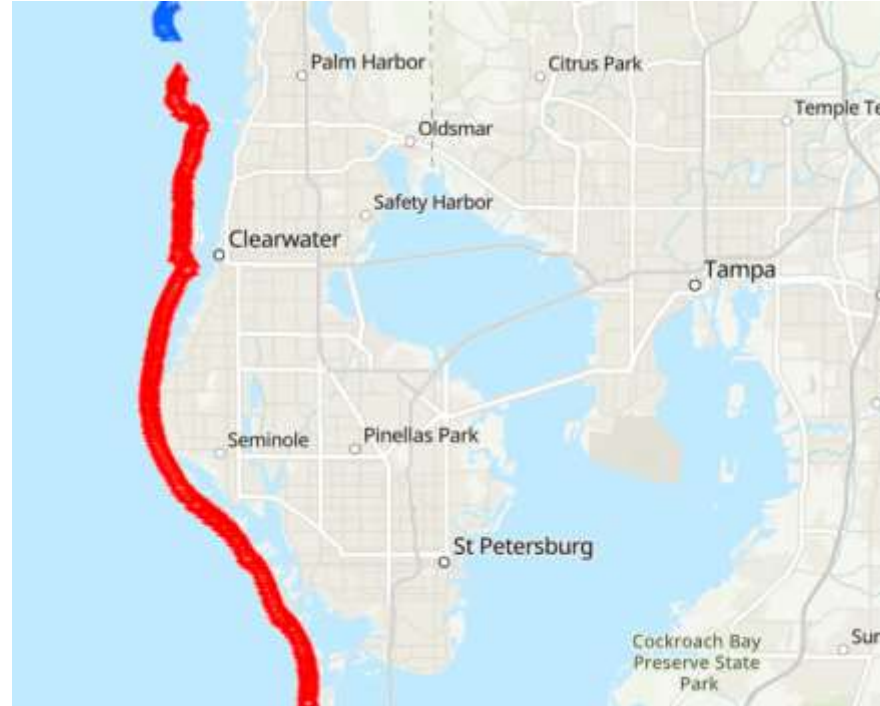
- ▶ Demonstrate that the project will not adversely affect the aesthetic values of the receiving water body.

- ▶ Demonstrate that the project will not jeopardize a threatened or endangered species.



Coastal Construction Control Line

- ▶ Section 161.041, Florida Statutes
 - ▶ Requires permit for coastal construction.
 - ▶ Must demonstrate:
 - ▶ Adequate engineering
 - ▶ Design features
 - ▶ Potential effects



<https://ca.dep.state.fl.us/mapdirect/?webmap=a8c9e92fbad5446d987a8dd4ee5dc5cc>



Mangrove Trimming Act

§§ 403.9321-9333, Fla. Stat.

- ▶ The Legislature finds that mangroves play an important ecological role as habitat for various species of marine and estuarine vertebrates, invertebrates, and other wildlife, including mammals, birds, and reptiles; as shoreline stabilization and storm protection; and for water quality protection and maintenance and as food-web support.



Mangrove Trimming Act

▶ Exemptions

▶ By homeowner

- ▶ Mangroves must be on your land
- ▶ Cannot be over 10 feet in pretrimmed height; cannot trim to less than 6 feet
- ▶ Shoreline must be 150 feet or less

▶ By professional

- ▶ Cannot be over 24 feet in pretrimmed height; cannot trim to less than 6 feet



Mangrove Trimming Act

▶ General Permits

- ▶ The trimming is conducted in an area where the department has not delegated the authority to regulate mangroves to a local government
- ▶ The trimming is supervised or conducted exclusively by a professional mangrove trimmer;
- ▶ The mangroves subject to trimming under the permit do not extend more than 500 feet waterward as measured from the trunk of the most landward mangrove tree in a direction perpendicular to the shoreline;
- ▶ No more than 65 percent of the mangroves along the shoreline which exceed 6 feet in pretrimmed height as measured from the substrate will be trimmed, and no mangrove will be trimmed so that the overall height of any mangrove is reduced to less than 6 feet as measured from the substrate; and
- ▶ No herbicide or other chemical will be used for the purpose of removing leaves of a mangrove.



Brownfields

Developing Contaminated Sites



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.
- ▶ Gives local governments the authority to establish brownfield areas.
- ▶ Must enter into a brownfield site rehabilitation agreement. § 376.80, 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

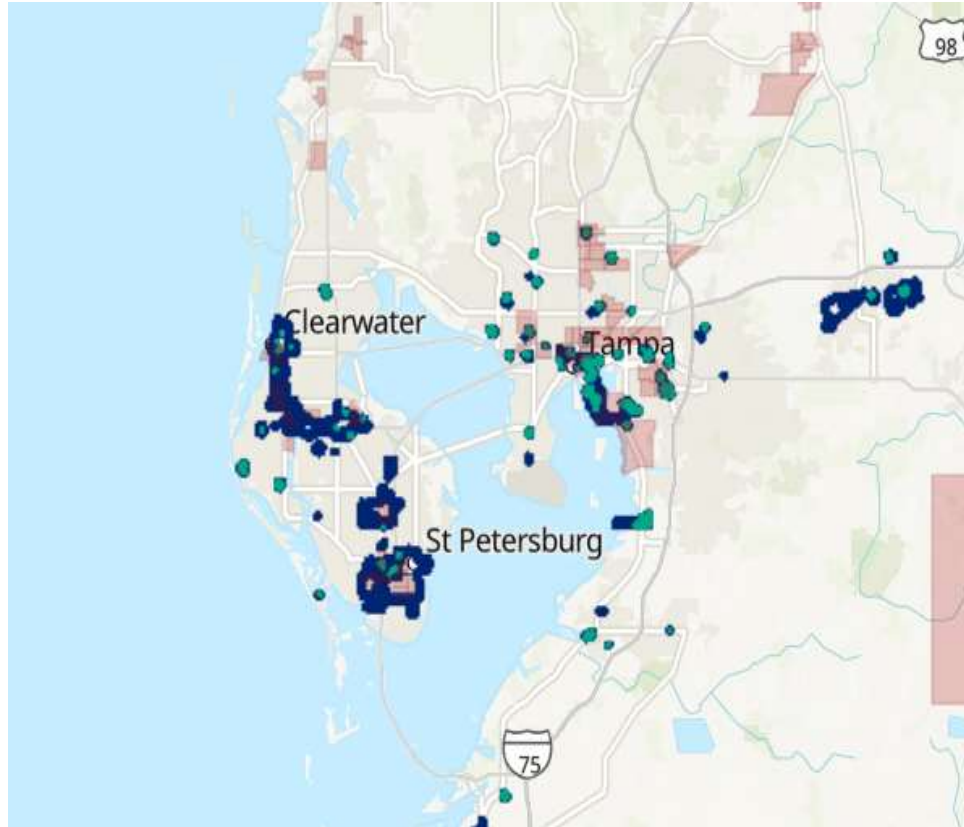


Key Provisions of the Act

- ▶ 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 - § 376.30781, 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)



Where are Brownfields Located?



- ▶ <https://ca.dep.state.fl.us/mapdirect/?focus=brnfls>
- ▶ Blue = brownfield area: green = brownfield site



Voluntary Cleanup Tax Credits

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.
- ▶ 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.







Questions?

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