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Environmental Update

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October 14, 2010

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Corps' Rules Regarding Prior Converted Cropland Set Aside

Contact: Amelia Savage

On September 28, 2010, U.S. District Judge K. Michael Moore of the Southern District of Florida entered an order setting aside and enjoining enforcement of the U.S. Army Corps of Engineers' so called "Stockton Rules." New Hope Power Co. v. U.S. Army Corps of Eng'rs, No.10-22777 (S.D. Fla. 2010).

Announced in January 2009 by the Corps' Jacksonville Field Office, the Stockton Rules provide that prior converted cropland that is modified to non-agricultural use is subject to regulation by the Corps. Prior converted croplands are areas that "prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible." 58 Fed. Reg. 45008-01, at 45031. Before conversion for agricultural purposes, by definition prior converted cropland was considered "waters of the United States" and therefore subject to the Corps' jurisdiction. According to the Stockton Rules, prior

converted cropland is non-jurisdictional only if it remains under active agricultural operations. The effect of this rule was a great expansion the Corps' jurisdictional reach.

In analyzing the validity of the Stockton Rules, the district court found that the Rules were legislative and substantive in nature; as such, they should have undergone the proper notice-and-comment procedures. The district court also found the Stockton Rules to be entirely inconsistent with prior agency positions.

Given the court's decision, prior converted croplands are no longer subject to Corps jurisdiction unless the lands cease to be used for crops and revert to a wetland state.

DEP Releases Draft Rule Language for October 20, 2010 Rulemaking Workshops

Contact: Robert Manning

As reported in the last HGS Update, the Florida Department of Environmental Protection ("DEP") will conduct two Rulemaking Workshops on October 20, 2010, in Tallahassee, Twin Towers, Room 609. The first will be held from 9:30 – 12:00 EDT, and will discuss DEP's intent to:

- (1) Expand permit exemption criteria;
- (2) Clarify when construction and operation permits are required;
- (3) Convert six Title V General Permits to Non-Title V General Permits; and
- (4) Clarify general permit rule language and forms.

The second workshop will begin at 1:30 EDT, and will discuss DEP's intent to:

- (1) Update Florida's Nonattainment New Source Review rules, including discussion of a NOx/VOC trading program for ozone;
- (2) Update references to particulate matter to include PM2.5; and
- (3) Revise rules related to state and federal ambient air quality standards, including the designation of areas as attainment or nonattainment.

DEP has now issued draft rule language that can be reviewed and downloaded under "Current Projects" at: <http://www.floridadep.org/air/rules/regulatory.htm>.

SRWMD Rulemaking in Response to SB 550

Contact: Amelia Savage

On October 1, 2010, the Suwannee River Water Management District (SRWMD) published a Notice of Development of Rulemaking. SRWMD proposes to update its rules based on the 2010 Florida Legislature's approval of Senate Bill 550 (SB 550), which deleted mandatory delegation of water use permit approvals to the Executive Director. Instead, the SRWMD Governing Board will have authority to establish the scope and terms of any delegation. Preliminary text of the proposed rule development is not yet available, but the notice can be found at

<https://www.flrules.org/gateway/readFile.asp?sid=2&tid=9193386&type=1&File=40B-2.041.htm>.

SFWMD Rulemaking Regarding ERPs

Contact: Amelia Savage

On September 24, 2010, the South Florida Water Management District (SFWMD) published a Notice of Development of Rulemaking. SFWMD proposes to amend the SFWMD's rules and Basis of Review for Environmental Resource Permit Applications. The amendments are intended to: (1) delete obsolete forms and other documents incorporated by reference; (2) update rules for consistency with statutory amendments; (3) update process for submitting forms and other documents to the District; (4) repeal rules that are unnecessary or language that is redundant; (5) update rule references; and (6) other non-substantive changes and clarifications. Preliminary text of the proposed rule development is not yet available, but the notice can be found at https://www.flrules.org/Gateway/View_notice.asp?id=9146729.