

Handbook of Florida Water Regulation: Clean Water Act¹

Michael T. Olexa, Tatiana Borisova, and Zachary Broome²

Preface

This handbook is designed to provide an accurate, current, and authoritative summary of the principal federal and state (Florida) laws that directly or indirectly relate to agriculture. This handbook provides a basic overview of the many rights and responsibilities that farmers and farmland owners have under both federal and state laws as well as the appropriate contact information to obtain more detailed information. However, the reader should be aware that because the laws, administrative rulings, and court decisions on which this handbook is based are subject to constant revision, portions of this publication could become outdated at any time. Several details of cited laws are also left out due to space limitations.

This handbook is distributed with the understanding that the authors are not engaged in rendering legal or other professional advice, and the information contained herein should not be regarded as a substitute for professional advice. This handbook is not all inclusive in providing information to achieve compliance with the federal and state laws and regulations governing water protection. For these reasons, the use of these materials by any person constitutes an agreement to hold harmless the authors, the Florida Cooperative Extension Service, the Institute of Food and Agricultural Sciences, and the University of Florida for any liability claims, damages, or expenses that

may be incurred by any person as a result of reference to or reliance on the information contained in this handbook.

CWA Overview

The Clean Water Act is directed at maintaining and restoring the chemical, physical, and biological integrity of navigable waters, which are broadly defined as all waters of the United States. These include the following:

- Territorial seas and larger bodies of water
- Lakes, streams, rivers, ponds, and other small water bodies, including more than strictly navigable waters but only if they are relatively permanent, standing, or flowing
- Wetlands, which are generally defined as lands that have a direct, continuous, surface connection to a “water of the United States” to such an extent that it is difficult to tell where the water ends and wetland begins

Primarily through its discharge permitting requirements, the Clean Water Act limits the amounts of pollutants that may be released into these waters in an attempt to keep the water at a level safe for many purposes (e.g., drinking and swimming, as well as for aquatic life).

1. This is EDIS document FE582, a publication of the Food and Resource Economics Department, Florida Cooperative Extension Service, Institute of Food and Agricultural Sciences, University of Florida, Gainesville, FL. Published December 2005, revised 2011. Please visit the EDIS website at <http://edis.ifas.ufl.edu>.
2. Michael T. Olexa, professor, Food and Resource Economics Department, and director, Agricultural Law Center, University of Florida, and chair, Agricultural Law Committee, The Florida Bar; Tatiana Borisova, assistant professor, Food and Resource Economics Department, University of Florida; and Zachary Broome, student, Levin College of Law, University of Florida, Gainesville, FL; Florida Cooperative Extension Service, Institute of Food and Agricultural Sciences, University of Florida, Gainesville, FL 32611.

Who Enforces CWA?

The Clean Water Act (CWA) is generally enforced by the United States Environmental Protection Agency (EPA), but dredge and fill permitting is enforced by the Army Corps of Engineers (ACE). EPA has established national standards that limit the maximum amount of pollutants that may be released into water under a permit. States are authorized under CWA to establish their own standards for allowable levels of pollutants as long as such standards are at least as stringent as those mandated by EPA. The state may also be delegated permitting authority by EPA. Currently, Florida has been delegated enforcement of only portions of CWA (National Pollutant Discharge Elimination System permitting is still conducted by EPA). However, EPA recently determined that Florida's water quality standards were insufficient under CWA, so EPA replaced the state standards with federal standards. Florida has filed a lawsuit against EPA, claiming the change in regulations is a violation of Congress's intent that EPA and the states work cooperatively under CWA.

How Is CWA Enforced?

National Pollutant Discharge Elimination System (NPDES) permits are the main avenue for the enforcement of CWA. These permits specify

- The amount and concentration of pollutants the holder is authorized to discharge
- The schedules directing when compliance must be achieved
- The requirements for testing, and monthly or quarterly reporting to the permitting authority

What Are Point and Nonpoint Sources?

CWA requires all operators of point sources of pollution to get permits. A "point source" is any discernable, confined, and measurable conveyance from which a pollutant is or may be discharged, and the point source does not have to be the pollutant generator to be regulated. A point source may be a ditch or pipe discharging pollutants, a container being rinsed of pollutants, or any other source that releases pollutants into a specific area. For instance, a ditch containing fertilizers or pesticides entering navigable waterways is a point source of pollution and is subject to the permitting requirements of CWA. Agricultural stormwater discharges and return flow (also called "nonpoint sources") from

agricultural irrigation systems are not point sources, however, and are therefore not covered by CWA (see FE617, Notes and Glossary, for a definition of nonpoint sources).

Runoff from nonpoint sources, especially agricultural nonpoint sources, is a major source of pollution of the wetlands and waters of Florida. Runoff from nonpoint sources containing, among other things, pesticides, animal wastes, nutrients (such as phosphorus), and other pollutants, is a major contributor of the pollution that is addressed in some of the federal and state acts and programs discussed in this handbook.

NPDES permits impose two types of limitations on point-source polluters:

1. *Technology-Based Effluent Limitations.* Limits placed on the contents of the effluent based on the best practicable treatment technology available to control pollutants
2. *Water-Quality-Based Effluent Limitations.* These limits depend on the standards established for the quality of the water body (including ground water bodies) into which the discharge takes place (cases are viewed on a case-by-case basis)

What Are the Rules for Dredge and Fill?

CWA requires separate permits for the discharge of dredge and fill material into navigable waters or wetlands. Dredge and fill permits are issued by the Army Corps of Engineers (ACE), but EPA has veto power over ACE-issued permits. EPA may enforce permits issued by ACE or those delegated to a state.

What Are the Rules for Oil and Hazardous Substances?

CWA also prohibits discharges of oil or specified hazardous substances. It further requires that all spills be reported immediately if the amount spilled is greater than the individual "reportable quantities" that EPA has specified for each of some 300 designated "hazardous substances." Reporting spills to the Emergency Superfund Branch (see FE615, Appendix, for telephone numbers) quickly insulates the offender from criminal prosecution but not from civil liability. It also provides for the development of a National Contingency Plan to efficiently remove spills.

What Are the Penalties under CWA?

The extent of criminal liability under CWA depends primarily on whether the violator is simply negligent (with fines up to \$25,000 per day and/or one year's imprisonment), knows of his or her violation (with fines up to \$50,000 per day and three years' imprisonment), or knowingly places others in serious imminent danger (with fines up to \$250,000 total and/or 15 years' imprisonment). All these penalties may be doubled for subsequent violations and some may be greater for corporations.

CWA also provides for civil and administrative penalties for each violation of CWA or an NPDES permit. Civil penalties can be imposed for up to \$25,000 per day for each violation. Administrative penalties can be imposed for up to \$125,000. Injunctive relief (which forces violators to cease polluting) or other court-ordered relief is also available.

Sources

33 United States Code, Sections 1251 to 1387

Rapanos v. United States, 547 U.S. 715 (2006)

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004)

Acknowledgments

The authors are indebted to the personnel of both state and federal agencies who provided their time and advice in the preparation of this handbook.