

# Handbook of Florida Water Regulation: Activities in Wetlands<sup>1</sup>

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## 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decisions on which this handbook is based are subject to constant revision, portions of this publication could become outdated at any time.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 provided as an educational text for those interested in water use and water resource issues in Florida.

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## Wetlands Overview

Simply put, wetlands are “natural areas of land that are usually wet and are sometimes covered by water” (as defined by UF/IFAS Water website at <https://water.ifas.ufl.edu/environment/wetlands/>). Wetlands can also be referred to as swamps, marshes, or bogs. Wetlands are important for a variety of reasons, for example, they provide habitat for wildlife, and they are often recharge areas for groundwater. That is why protection of wetlands is important.

Various agencies offer more technical definitions of wetlands used for regulatory purposes. According to Section 373.019(25), Florida Statutes, “wetlands” are defined 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. (...)” More specific definition used for wetland delineation can be found in [Rule 62-340, Florida Administrative Code](#) and at the [Florida Department of Environmental Protection’s website](#).

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## Who regulates wetlands?

The regulation of wetlands is carried out at the federal level by the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (USACE), and at the state level by the Florida Department of Environmental Protection (FDEP).

Federal protection of wetlands stems from several sources. The federal Clean Water Act (CWA) creates a framework for regulation of the discharge of dredged or fill material into waters of the United States (including wetlands). This framework includes a requirement to have a federal-issued permit to perform dredging and filling activities. EPA develops and interprets policy for evaluating the permit applications for such activities. For many states, EPA reviews and comment on permit applications. In Florida, the authority to issue most permits related to dredging and filling is delegated to the Florida Department of Environmental Protection (FDEP) (effective December 2020), with the exception of waters and areas requiring a permit issued by the United States Army Corps of Engineers (USACE) (see FDEP's 404 Jurisdiction Determination Mapping Tool at <https://fdep.maps.arcgis.com/apps/webappviewer/index.html>). Pursuant to the National Environmental Policies Act (NEPA), USACE must complete an "environmental impact study" before issuing a permit for work in sensitive areas, especially wetlands. Specific requirements of the federal Endangered Species Act (ESA) can also apply given that many endangered species call wetlands home, and any changes in the wetlands can alter their habitat.

On the state level, FDEP is the primary agency responsible for wetland protection. FDEP has been given authority to protect environmentally sensitive wetland areas and designated areas of critical state concern. Prominent examples include the Florida Keys, Big Cypress Area, Green Swamp Area, the Everglades Protection Area, and the Apalachicola Bay Area. In December 2020, FDEP was granted the permitting authority to regulate dredge and fill activities for wetlands and waters of the United States.

In addition, the appropriate Florida water management district (FWMD) should be consulted about any work to be done near any wetland. FWMDs have adopted Management and Storage of Surface Waters (MSSW) rules that regulate activities in wetlands under FDEP supervision (see FE605, MSSW). FWMDs are authorized to establish specific permitting criteria for dredge and fill operations in connected and isolated wetlands.

## When are wetland permits required?

Dredge and fill permits are required for any non-exempt activity under Chapter 403, Florida Statutes. To obtain a permit, the applicant must prove to the FDEP (or appropriate FWMD) that state water quality standards will not be violated by the proposed dredging and filling activity.

In addition, the project cannot be contrary to public interest. Several factors must be considered in this determination, including

- The effect on public health, safety, welfare, and property rights
- The effects on fish and wildlife (especially on threatened or endangered species)
- Adverse effects on navigation or harmful erosion
- A variety of other factors such as effects on marine productivity, temporary or permanent nature of the project, and effects on historical and archaeological resources

In the final analysis, factors that mitigate destruction of the wetlands are also considered where some damage to the environment is inevitable.

## What is exempt from wetland regulations?

At the federal level, normal farming, silviculture, and ranching activities in wetlands are exempt from the fill permitting mandates of the CWA. This exemption does not apply to mechanized equipment used in land clearing, as this has been held to represent a point source of pollution (i.e., fill).

At the state level in Florida, agricultural activities and agricultural closed water management systems are exempt from wetland regulation provided that the activities are consistent with agricultural activities. "Agricultural activities" are defined to include all necessary farming and forestry activities that are normal and customary for a particular area provided such operations do not impede or divert the flow of surface waters. "Agricultural closed water management" includes farming or forestry water management systems and farm ponds that are permitted pursuant to Chapter 373, Florida Statutes, or exempted from the permitting requirement of the surface water management statutes (see FE605, MSSW).

## What is mitigation and mitigation banking?

The mitigation and mitigation banking process can apply to wetland activities in the same way as for MSSW (FE605). Mitigation can be used to offset potential harms resulting from activities in wetland areas. The FDEP and FWMDs have established criteria on when mitigation is appropriate or desirable.

## What is reclamation?

Under Florida's land reclamation statute, Chapter 378, Florida Statutes, Section 378.202, land, including wetlands, must be restored to an acceptable condition (i.e., reclaimed) after a mining operation. Reclamation is the process of returning land that has been mined to a higher dollar value by physically changing the land to a more usable state. Reclamation activities must meet the groundwater and surface water management requirements of the FDEP and the appropriate FWMD, including design standards for water bodies.

In accordance with these requirements, best management practices (BMPs) should be undertaken to minimize erosion after reclamation. Also, for mining activities on shorelines, specific procedures for shoreline treatment are prescribed by BMPs where digging results in the formation of a water body as follows:

- The appropriate FWMD executive director must be notified of a party's intent to extract minerals, clay, peat, gravel, sand, or other solid substance of commercial value (usually submission of a conceptual reclamation plan is appropriate)
- All reclamation activities should be conducted in a manner that reduces adverse impacts on groundwater and surface water resources (including wetlands), wildlife, and adjacent lands

An exemption to the notification requirement applies for digging confined to one acre or less in any given year, not to exceed five acres over the life of the mine or the party who extracts. On a similar note, fuller's clay, heavy minerals, limestone, and phosphate are covered separately by permitting requirements.

## What are the rules for mangroves?

The cutting or removing of mangroves is only allowed when authorized by dredge and fill permits. The penalty for unauthorized trimming or alteration of mangroves is the cost of restoration. To avoid such a penalty, permits should

be obtained, and a variance exemption may be granted where unique and unnecessary hardship will otherwise result for the applicant. Permits of this type are issued by the FDEP, USACE, or a local government holding delegated authority. Cutting or removing mangroves is allowed where the environmental impact is minimal. In some cases, selective trimming may be permitted to facilitate enjoyment of riparian rights. In other cases, there are certain exceptions to the permit requirements when dealing with manmade canals, previously planted mangroves, and dead mangroves. Landowners should consult with the FDEP or the appropriate FWMD to see if one of these exceptions applies.

Applications to cut or remove mangroves are transferred to county or municipal offices having jurisdiction over the area for which the permit is being requested. Applicants should be aware that there are department-approved dredge and fill regulatory programs to advise applicants on this concern.

## What are the penalties regarding wetlands?

Civil liability exists for damage caused to water from unlawful dredging, filling, or destruction of wetlands. Fines may run as high as \$15,000 per offense, and liability may be joint and several (see FE598, Private Regulation, for discussion of joint and several liability, also, see the joint and several liability discussion as it applies to unlawful dredge and fill of wetlands in Florida Statute 403.141).

Criminal sanctions apply for willful pollution or contamination, making these violations third-degree felonies. Fines up to \$50,000 per offense and imprisonment for up to five years may be imposed. Furthermore, each day of non-compliance may create a separate violation. Reckless indifference or disregard of the probability of harm to the state's water resources is a second-degree misdemeanor with a fine of not more than \$10,000 and/or sixty days imprisonment. Failure to obtain a permit, failure to comply with regulations, or making false statements to the permitting authorities are all first-degree misdemeanors punishable by a fine of not more than \$10,000 and/or six months' imprisonment.

## Sources

Chapter 373, Florida Statutes, Sections 373.403 to 373.413

Chapter 403, Florida Statutes, Sections 403.9324 to 403.9333

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