

Issue Paper regarding "normal circumstances" and use of
Section F, Atypical Situations, of the 1987 Wetland Delineation
Manual for jurisdictional determinations in the
Everglades Agricultural Area

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PROBLEM STATEMENT:

The Jacksonville District has five pending applications for approved jurisdictional determinations (JDs) in the Everglades Agricultural Area (EAA) associated with proposed mining. The applicants have asserted that the normal circumstance is the current "pumped" condition and that Section F of the 1987 Wetland Delineation Manual does not apply.

BACKGROUND:

The Central and Southern Florida Project for Flood Control and Other Purposes (C&SF Project) of 1948 provided flood protection and water control for 1,027 square miles of developed and potentially productive agricultural land adjoining the southern shore of Lake Okeechobee. Called the Everglades Agricultural Area (EAA), this area covered approximately 700,000 acres and encompassed about 27% of the historic Everglades. The major crop of the EAA is sugar cane, but winter vegetables are also grown as well as sod. The area has been the location of substantial soil subsidence due to draining over time and the majority of the EAA is now at a lower elevation than the land around it and even the canals that run through it. Active pumping throughout the area keeps the land farmable by artificially lowering the water table elevation to between 18 and 36 inches below the surface.

There is some indication that Natural Resource Conservation Service (NRCS) has classified the farm fields in the EAA as prior converted cropland (PC) but there is no evidence of a certified PC designation. The NRCS policy is that determinations done prior to July 3, 1996 are subject to revision upon onsite determination since they may not have been "of sufficient quality to make a determination of ineligibility" as stated in the law. Since mining represents a change in land use the PC classification is no longer applicable to the sites as only the NRCS can classify an area as a PC, and according to their regulations at 7 CFR 12.30(C)(6) (enclosed), once a property changes from agricultural use to non-agricultural use, a PC designation is no longer applicable. Since the PC designation no longer has meaning independent of the NRCS regulations, the land becomes subject to regulation under Section 404 of the Clean

Water Act (CWA). This has been the Jacksonville District's practice since around 2000.

JDs have been completed in the EAA by the Jacksonville District for farm fields converted to other land uses. Examples include abandoned, fallow fields and agricultural lands with active operations converted to stormwater treatment areas and above-ground storage reservoir as indicated in the following examples:

Compartment A: In 2006 a JD was performed for approximately 16,000 acres of predominately farm lands in Compartment A of the EAA. The Jacksonville District asserted jurisdiction over 15,467.48 acres of agricultural lands, i.e., atypical wetlands, due to the positive indicators of wetland hydrology and hydric soils. The Jacksonville District applied Section F of the 1987 Manual and ignored the vegetation component which consisted primarily of sugarcane. It is not know whether the site was actively being drained at the time of the site visit but positive indicators of hydrology were present at all sampling points. Compartment A also includes 187.63 acres of natural wetlands which were not previously farmed.

Compartment B South: In 2007 the Jacksonville District asserted jurisdiction over 4,906 acres of wetlands that had been previously farmed. The area had been abandoned and wetland vegetation had recolonized throughout the entire parcel. A routine wetland determination resulted in positive indicators of wetland vegetation, wetland hydrology, and hydric soils at all sampling points.

Compartment B North: In 2007 the Jacksonville District asserted jurisdiction over 4,049 acres of active agricultural lands, i.e., atypical wetlands. The Jacksonville District applied Section F of the Manual and ignored the vegetation and hydrology parameters. The parcel contained hydric soils at all sampling points. Wetland hydrology was not present at the time of the site visit since the site was actively being managed for sod and sugarcane. A geotechnical investigative report performed by the applicant's consultant stated if the pumps were turned off the water table would be within 12 inches of the surface. The Jacksonville District asserted this (pumps turned off) was the normal circumstance for purposes of the JD.

Compartment C: In 2007, the Jacksonville District asserted jurisdiction over 317 acres of wetlands that had been previously

farmed and 3,544 acres of fallow agricultural lands or i.e., atypical wetlands. Agricultural operations were only recently abandoned in Compartment C such that the majority of the lands still contained a predominance of sugarcane vegetation with no active pumping. Positive indicators of wetland hydrology and hydric soil were observed throughout the jurisdictional areas.

In all of the above cases, the Jacksonville District applied Section F of the 1987 Manual and ignored the vegetation parameter which was predominately sugarcane in the case of Compartment A, and Compartment C and sugarcane and sod in the case of Compartment B North. With respect to hydrology, the normal circumstance was considered to be current landscape containing the canals and agricultural ditch network, but with the pumps turned off. For all sites where no pumping/draining was occurring, positive indicators of wetland hydrology were present. Positive indicators of hydrology were not observed for the site with active pumping; however, a geotech report confirmed that under the normal circumstance (no pumping) wetland hydrology would exist. The Jacksonville District considers the normal circumstance to be the land as modified by the agricultural activities (i.e. ditch network) but with no active pumping.

Discussion:

The pending applications are as follows: Lake Harbor Quarry - 7,629 acres, South Bay - 3,773 acres, Bergeron - 553 acres, Five Star - 1,070 acres, and Stewart - 5,400 (JD request only). The applicants have asserted the normal circumstance is the active agricultural operations (with pumping) and that Section F for atypical situations is not applicable and active agricultural is the normal condition. The applicants have based their assumptions on the fact that the EAA was partially converted to agriculture prior to passage of the CWA thus the activity is not recent, and since the conversion did not require a permit, it is their position that Section F is not applicable. Additionally, the applicants have stated that the agricultural activities will not cease once the mining commences since in some cases the mines will be connected to the agricultural ditch network. Taking this into account, the miners assert that a routine determination should be conducted. Under this approach, the sites would not be considered jurisdictional since wetland vegetation was historically removed and replaced with farm crops that are generally not considered to be hydrophytic species. An exception is cultivated rice (*Oryza spp.*) since some species of rice such

as *Oryza sativa* are classified as OBL. Additionally, wetland hydrology may or may not be present depending on whether the fields are being drained or flooded at the time of the site visit.

Although it is true that parts of the EAA were indeed being farmed prior to the authorization of the C&SF Project in 1948, the C&SF did not convert the EAA from wetland to nonwetland conditions. This is observed in parcels within the EAA that have been abandoned (Compartment B South) as well as parcels where the agricultural crop is still present but pumping has ceased (Compartment A and Compartment C). Furthermore, construction of similar flood control features (that were not part of a congressionally authorized project) today would require permit authorization under Section 404 of the CWA.

At the national level, the Corps is fairly consistent in applying Section F, Atypical Situations, when conducting a JD for CWA purposes on agricultural areas proposed for non-agricultural uses. This has been the practice since around 2000 when the Corps recognized the NRCS designation was only valid if the land remained in agricultural use. Continuous pumping to draw down the water table is not considered the "normal circumstance" for those PC areas that are changing from agricultural to non-agricultural uses. In the EAA, the water table can be manipulated by pumping so it can be kept at any depth, depending on purpose. Depending on the crop rotation, fields are pumped down for several consecutive years and then may be back-pumped for a season and flooded. The flooding allows rice to be grown, controls nematodes and slows the soil from oxidizing. However, if the pumps were to be turned off, the water table would be at or above the surface over most of the EAA.

It is important to note that EAA is in the United States Department of Agriculture (USDA) category of "Unique Farm Land" since it has the potential to produce high value crops such as sugarcane and vegetables. A USDA classification of "Prime Farm Land" is restricted to soils which have no limitations to produce crops in their native condition. In the EAA drainage and management inputs such as drawdown of the water table is required to produce agricultural crops. This artificial manipulation is not the normal circumstance.

In those areas where the water table (hydrology) is manipulated by pumping, it will not be possible to evaluate the normal

circumstance for hydrology by monitoring of the water table unless the pumping has ceased for a minimum of one year, provided said year has been determined to have normal precipitation as defined in Technical Standard for Water-Table Monitoring of Potential Wetland Sites by U.S. Army Corps of Engineers (ERDC TN-WRAP-05-2, June 2005). Additionally, all monitoring should be performed in accordance with the aforementioned Technical Standard.

SUMMARY:

Regardless of whether agriculture ceases on lands adjacent to the proposed mines, the land itself within the footprint of the mines will be permanently converted to non-wetland. The PC designation is not valid and the Jacksonville District is conducting JDs in accordance with Section F of the 1987 Manual since one or more of the parameters have been manipulated and removed. The Jacksonville District interprets the "normal circumstances" to be the non-pumped condition since the water table can be manipulated at will by mechanical pumping but the land is changing from agriculture to non-agriculture.