

2021 Handbook of Florida Water Regulation: Management and Storage of Surface Waters¹

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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decisions on which this handbook is based are subject to constant revision, portions of this publication could become outdated at any time.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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MSSW Overview

Who regulates the management and storage of surface waters?

To prevent harm to Florida's waters, both the Florida Department of Environmental Protection (FDEP) and the Florida Water Management Districts (FWMDs) are authorized to require Management and Storage of Surface Water (MSSW) permits and impose conditions on those permits. This authority, however, is delegated almost entirely to FWMDs, which should be consulted before any alteration of surface water is undertaken (see FE616, Contact Agencies).

What is included under MSSW?

The scope of the statutes and rules governing surface water management extends to the construction, operation, or alteration of any "stormwater management system, dam, impoundment, reservoir, or appurtenant work." The statutory definitions of these terms allow the FDEP and FWMDs to collectively regulate virtually every type of artificial

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or natural structure or construction that can be used to connect to, draw water from, drain water into, or be placed in or across surface water. This includes all structures and constructions that can have an effect on surface water, such as

- Dredging
- Filling
- Activities that create canals, ditches, culverts, impoundments, fill roads, buildings, and other impervious surfaces

What are the exemptions under MSSW?

To avoid burdensome permitting requirements on farmers, the statute contains a qualified exception. People engaged in the occupation of agriculture, silviculture, floriculture, or horticulture may alter any tract of land without an MSSW permit so long as the practices are normal occupational activities whose sole or predominant purpose is not to obstruct or impound surface water, including

- Site preparation, clearing, fencing, or contouring to prevent soil erosion
- Soil preparation, plowing, planting, or harvesting

Each FWMD has entered into a memorandum of agreement with the Florida Department of Agriculture and Consumer Services (FDACS) listing the proposed or existing activities that qualify for the exemption to MSSW permitting. The agreements include the processes and procedures for evaluating whether an activity qualifies for the exemption. To qualify, the impoundment or obstruction of surface waters may not be the chief purpose of the alteration. Construction or maintenance performed on dikes, dams, or levees in an agricultural closed system will be exempt from MSSW permitting requirements (to clarify, a *closed system* means a self-contained irrigation system used in farming that does not discharge offsite). Nonetheless, these works must still comply with generally accepted engineering standards and, where the engineering practice is regulated by the state, this might require proper certification of the project and strict adherence with the original plans.

It is always wise to consult with the specific district when attempting to determine whether a proposed activity is exempt because a written notice from FDEP or the appropriate FWMD is sometimes required. Also, FWMDs have the FDACS guidelines for determining whether the activity is actually exempt.

When are MSSW permits required?

Certain FWMDs rely on the “threshold” concept to determine when a permit is required. For example, once a certain quantity of water is impounded by an activity or a certain size project is proposed, the appropriate FWMD will require a permit unless the activity is somehow exempt. Although statutory exemptions apply in all five FWMDs, permitting thresholds and exemptions adopted by rule will vary from district to district. Water quality and quantity considerations, as well as general environmental concerns, will be addressed in the MSSW permit application process. In addition, MSSW permits are now required before building a dry storage area for ten or more vessels if that storage area is associated with a boat launch.

As with other types of permits, revocation or modification of the MSSW permit may occur if the permit conditions or the statutory mandates are not met.

What are the eligibility rules for MSSW permits?

At the most basic level, the applicant must show that what is being planned will not be harmful to the water resources and that the planned activity will not be inconsistent with the objectives of the appropriate FWMD. In other words, the planned activity cannot be against the public interest.

If the planned activity will significantly degrade the water quality, the applicant may still be eligible for a permit if the applicant can show that the planned activity is clearly in the public interest. To determine whether or not a planned activity is clearly in the public interest, there are seven basic criteria that must be considered:

1. Whether the activity will adversely affect the public health, safety, welfare, or the property of others
2. Whether the activity will adversely affect fish and wildlife conservation, including threatened and endangered species and their habitat
3. Whether the activity will adversely affect navigation or the flow of water, or cause erosion
4. Whether the activity will adversely affect fishing or recreational values or marine productivity in the area of the activity
5. Whether the activity is permanent or temporary in nature
6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources

7. Whether the current condition and value of activities occurring in the area will be affected by the planned activity

In addition, there are certain activities that have been listed as in the public interest, such as peat farming or any use of lands that constitutes part of conceptual reclamation plans, so it is best to check with the appropriate FWMD to see if a particular activity qualifies. If the applicant has trouble meeting the criteria of the appropriate FWMD, the applicant can still be eligible for a permit as described below.

What is mitigation?

Mitigation is the creation, maintenance, or restoration of a surface water area in exchange for the degradation of another area. If someone plans an activity that will degrade surface water in the area of activity, that person might still be eligible for a permit. However, that applicant will have to mitigate the damage by creating a wetland or habitat elsewhere or restoring another wetland or habitat.

What is mitigation banking?

FDEP and water management districts may require permits to authorize the implementation and use of mitigation banks. A mitigation bank permit constitutes authorization to construct, alter, operate, maintain, abandon, or remove any surface water management system necessary to establish and operate a mitigation bank. Also, in order to obtain a mitigation bank permit, an applicant must provide certain reasonable assurances (i.e., that the proposed mitigation bank will improve ecological conditions of the regional watershed).

Are MSSW permits void after the sale of land?

The permit is permanent, and the sale has no effect on the validity of the permit, as long as the owner in whose name the permit was granted notifies the FWMD governing board or FDEP of the change of ownership within 30 days of the transfer.

What are the penalties under MSSW?

Aside from modification and revocation of permits, FWMDs are empowered to impose civil penalties up to \$15,000 per offense per day for mismanagement of surface water in violation of the statutes or permit conditions. In addition to civil penalties, violations can involve criminal penalties. Specifically, any willful violation of the statute that results in pollution and damage to human health or welfare or the environment makes the violator guilty of a third-degree

felony, punishable by a fine up to \$50,000 or up to five years' imprisonment. A violator who causes pollution through reckless indifference or gross careless disregard is guilty of a second-degree misdemeanor, punishable by a fine up to \$10,000 and/or 60 days imprisonment for each offense. Furthermore, intentional violations of the statute, other than polluting, may be a first-degree misdemeanor, giving rise to a fine up to \$10,000 and/or six months' imprisonment.

What other permits are required?

Regardless of whether MSSW permit requirements attach to the surface water management system, other permits may be necessary. For example, consumptive use permits apply to the taking and discharging of water for filling, replenishing, and maintaining water level in agricultural closed systems (see FE604, Consumptive Use), and fill permits may be necessary for below-threshold-dike (a dike that exists below the water line) building projects based on wetland considerations and federal regulations (see FE606, Activities in Wetlands and Watersheds).

After permit approval, following certain best management practices (BMPs) is an excellent way to help ensure continuing compliance with government regulations. Examples include establishing buffer strips and streamside management zones around a system, maintaining streams and culverts so as not to affect upstream or downstream culverts, and carefully constructing access roads. The BMP manuals adopted by FDACS for different types of agricultural operations and different geographical regions can be found at the FDACS Office of Agricultural Water Policy website at <http://www.floridaagwaterpolicy.com/BestManagementPractices.html>.

Sources

Chapter 373, Florida Statutes, Sections 373.403 to 373.459

Title 40, Florida Administrative Code (individual FWMD rules)

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