



## Federal Court Restricts Corps' Regulation of Wetlands

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A Florida federal judge has issued an order prohibiting the Army Corps of Engineers (the "Corps") from expanding the Corps' authority under the Clean Water Act (the "CWA") without first complying with appropriate administrative procedures. See *New Hope Power Co. v. U.S. Army Corps of Engineers*, 2010 WL 3834991 (S.D. Fla., September 29, 2010).

Under the CWA, the Corps is charged with regulating the "navigable waters" of the United States including wetlands. For years the Corps' stated policy was waters of the United States do not include prior converted cropland. Prior converted cropland is land drained prior to December 23, 1985, for agricultural purposes. See 58 Fed. Reg. 45008-01, at 45031 (Aug. 25, 1993). However, in January 2009 the Corps' Jacksonville Field Office prepared an Issue Paper which subsequently was approved in an April 2009 Affirming Memorandum by Steven L. Stockton, the Corps' Director of Civil Works, (collectively the "Stockton Rules"), as the Corps' national position on prior converted cropland.

The Corps' new position was that prior converted cropland, which was shifted to non-agricultural use became subject to regulation by the Corps as wetlands. Despite being required pursuant to the Administrative Procedures Act ("APA"), there was no notice-and-comment period before Stockton's Affirming Memorandum was issued, implemented, and enforced nationwide by the Corps.

The Court found the Stockton Rules represented a definite shift in the Corps substantive rules regarding what the Corps considers wetlands. Thus, "the Stockton Rules broadly extended the Corps' jurisdiction and sharply narrowed the number of exempt prior converted croplands."

In striking down the Stockton Rules in their entirety, the Court concluded the Stockton Rules constituted new legislative and substantive rules and these new rules were procedurally improper because the Corps failed to follow the appropriate procedural steps necessary to change administrative regulations.

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