

RESPONSE TO THE U-CAN QUESTIONS CONCERNING EPC WETLAND RULE AMENDMENT, SEC. 1-11.12

QUESTION

- 1) Why the urgency to push through an amendment when no justification for it has been provided?

ANSWER: The staff of the EPC proposed and the Commission approved the “Hybrid Model” in August 2007. Part of the approved Hybrid Model specifically addressed an amendment to the EPC Wetland Rule that would address wetland impacts arising out of bona fide agricultural activities. The staff committed to providing the EPC board a proposed rule amendment for adoption at the October 2007 regular board meeting. *Answered by EPC staff*

QUESTIONS

- 2) Where are the financial impact statements and/or any reports or studies that demonstrate how existing environmental regulations place an undue burden on agriculture? Where are the studies that demonstrate how relaxing existing environmental regulation will relieve this alleged burden? Without this information, how do you justify an exemption for one type of land use and not another? Anecdotal statements or claims **should not suffice** to amend regulations.
- 3) Where are the impact statements and/or reports and/or studies that show the environmental and financial impacts **to all residents** in Hillsborough County that will result from adoption of this amendment? What are the potential cumulative effects on the natural habitats, the wildlife population, the water quality – especially to all the impaired water bodies we have identified and will have to use taxpayer dollars in order to meet Federal standards?

ANSWER to Questions 2 and 3:

Rule Change Rational:

In 1997 the *Hillsborough County Agriculture Task Force Final Report* was presented to the Board of County Commissioners. One of the objectives given to the Task Force was to identify impediments to the continuation of agriculture in Hillsborough County. The regulatory process was identified as one of the major issues that were impacting agriculture. They attempted to conduct an analysis of the costs and effects of regulations on Hillsborough County agriculture. Because of the magnitude of this

undertaking, it was never fully completed. Some findings that came out of the process were that: agriculture was a heavily regulated industry (up to 46 agencies); there was miscommunication between farmers and the agencies, between the agencies themselves, and within agencies; and the regulations were written with little understanding of agriculture and the implication that they would have on the industry. Recognizing that agriculture has a unique relationship with the environment, most of the regulatory recommendations from the Task Force involved reducing regulatory duplication and streamlining the process. One specific recommendation was:

Support development of a "Memorandum of Agreement" (MOA) among the Southwest Florida Water Management District, Hillsborough County Environmental Protection Commission, Florida Department of Agriculture and Consumer Services, Florida Department of Environmental Protection and Hillsborough County Department of Planning and Growth Management (with input from agencies' Advisory Committees) to create a voluntary alternative process to address regulatory requirements, including wetland and stormwater regulations for farming operations in Hillsborough County.

As part of the Hybrid Wetlands Proposal, the Environmental Protection Commission of Hillsborough County proposed the following language for regulating agriculture related wetland impacts. The Environmental Protection Commission Board subsequently approved the proposal at the August 16, 2007 EPC meeting.

Agricultural Ground and Surface Water Management (AGSWM) - EPC will coordinate with the SWFWMD in the implementation of the AGSWM program for agricultural projects and develop specific rules and standards to incorporate the principles of AGSWM. EPC will consider projects that go through the AGSWM process and receive an exemption from permitting or an Environmental Resource Permit as meeting the EPC reasonable use criteria for impacts. For projects described above and for production related agricultural activities on property engaged in bona fide agricultural uses (except for harvesting primary growth natural forested wetlands), mitigation will be required for cumulative impacts greater than ½ acre and for individual isolated wetlands greater than ¼ acre.

This proposal provides specific requirements that must be included in the amendment language including a process for agriculture projects incorporating the principles of AGSWM to meet the EPC reasonable use criteria and a limited mitigation exemption for impacts to small isolated wetlands. The proposed amendment language accomplishes both of these goals.

This proposal will reduce duplication and streamline the wetland regulatory process for farmers and will more closely align the EPC Wetland Rule with policies and procedures that the Southwest Florida Water Management District (SWFWMD) uses to address wetlands for agriculture projects.

In developing the proposal and subsequent rule, the Environmental Protection Commission reasoned that agriculture is more compatible with the environment than other types of development and their impacts should be evaluated differently. Agriculture land accounts for 37% of the land in Hillsborough County and it provides for environmental and aesthetic benefits, including wetlands. A reduction in the regulatory burden that agriculture faces can help the industry remain economically viable and continue to exist against the potential for more intense, less environmentally-friendly, development.

In terms of agriculture production, small isolated wetlands pose a considerable obstacle for farmers in the efficient use of their land. Currently, if a piece of property has small isolated wetlands scattered throughout the property the farmer must avoid the wetlands and provide a 30ft setback. This can result in a significant amount of lost production acreage. For example, if a farmer has a ½ acre wetland, the total area that must be set aside is 0.92 acres (0.5 acre wetland area and 0.42 acre setback area). If a farmer has a ¼ acre wetland, the total area that must be set aside is 0.56 acres (0.25 acre wetland area and 0.31 acre setback area). These examples show that the setback area for small wetlands can be larger than the wetland itself. Each acre of lost production area can have a significant impact on the farmer's profitability (Each acre of strawberries provides \$28,000 in revenue; each acre of ornamental plants provides \$57,000 in revenue).

The forgone production area is not the only impact to the farmer. The avoidance of these areas leads to an inefficient field layout and other design problems. The end result to the farmer is additional production cost, decreased productivity, and lower profitability. The proposed rule will help address these issues

Potential Impact of Rule (From the TAG Position Statement):

The proposed rule defines the method by which an agriculture project can meet the reasonable use criteria using existing processes that are in place with the SWFWMD. These processes occur on a limited basis and typically take place when land is converting from one agricultural use to another. By utilizing the SWFWMD procedures, EPC can be assured that the proposed impact is for an agricultural purpose and is normal and necessary for the operation.

If a farmer is determined to have met the reasonable use criteria, it does not exempt a farmer from EPC's mitigation requirements. Under the proposed rule, mitigation will be required for impacts to wetlands equal to or greater than ¼ acre in size. EPC has determined that there are a total of 291 individual wetlands less than ¼ acre in size on land used for agriculture. If these wetlands were all about ¼ acre each, the total wetland acreage would be about 73 acres. The implementation of this proposed rule does not mean that all of these wetlands will be automatically allowed to be impacted with no mitigation. The impact would first have to go through the reasonable use determination which would involve the AGSWM process, an Environmental Resource Permit, or an exemption letter from the Water Management District. The AGSWM process does not allow impacts to wetlands greater than ½ acre and no wetland impacts if the farmer wants to maintain NRCS assistance. This provides for an incentive to the farmer to not impact wetlands on their site. These processes do not allow wetland impacts "just because"; the impact must meet the criteria of the SWFWMD.

The SWFWMD AGSWM program and ERP process typically takes place when agricultural land is converting from one agricultural use to another, such as pasture or citrus to strawberries or vegetables. According to the SWFWMD, the conversion from one agriculture use to another is projected to be about 360 acres per year through 2015. Currently, the Hillsborough County Property Appraisers Office has 177,000 acres, on 7,028 parcels, classified as Agricultural Use in private ownership (Report Dated 2/2/07). The 360 acres of agriculture land converted annually from one agriculture use to another represents only 0.2 % of the total agriculture acreage in Hillsborough County. If the ¼ acre and less wetlands (291 Total) are evenly distributed across the agriculture parcels, only 4.1% of all agricultural properties have wetlands less than ¼ acre. These two factors together show that the potential impact to wetlands less than ¼ acre, without mitigation, would be very minimal. All impacts to wetlands greater than ¼ acre will be mitigated in the proposed rule.

Water Quality:

The Florida Department of Agriculture and Consumer Services and the Florida Department of Environmental Protection are currently implementing Statewide Agricultural Best Management Practices. This process involves the development of Best Management Practice Manuals, the adoption of these as State Rules, and implementation by farmers. The Best Management Practices, if adopted by Rule, are assumed to meet the water quality standards set by the State.

Answered by Steve Gran - Hillsborough County Agriculture Economic Development Council

Section 1-11.12 Bona Fide Agricultural Activities

QUESTION

- 1) What is a "bona fide agricultural activity"? Stating that the activities *include* farming operations and listing examples of those operations does not provide an adequate definition. Some allowable Ag uses identified in the Hillsborough County LDC (sec. 2.02.01 Agricultural Uses) include bee keeping, private horse stable, kennels, feedlots, rural home industry (?), a Bed and Breakfast among others. Would these and other proposed uses contradict and unduly broaden the intent of the proposed exemptions? Without clearly identifying and **limiting** acceptable activities such as row crops, citrus, etc. –are we inviting legal challenge?

ANSWER: “Bona Fide Agricultural Activities” are defined in the proposed rule as activities including “necessary farming operations which are normal and customary for the area, such as site preparation, clearing, fencing, contouring to prevent soil erosion, soil preparation, plowing, planting, harvesting, and construction of access and internal roads, bridges, or culverts to facilitate these operations; construction or maintenance of irrigation and drainage ditches; and construction, operation or maintenance of agricultural use ponds.” The definition is adequate for purposes of the Wetland Rule. Incorporating a more specific definition is possible but this could create problems in the future because of the multitude of unexpected activities that could be included or excluded depending on the circumstances. Any word can be interpreted differently so this language would not “invite legal challenge.” *Answered by EPC staff*

QUESTION

- 2) What does “necessary farming operations that are normal and customary for the area” mean? Who determines what is necessary and normal and customary? The construction of an access road to a kennel seems normal and customary, so does this mean putting it through the wetland would be acceptable? If not, then what provision allows you to deny the impact?

ANSWER: “Necessary farming operations that are normal and customary for the area” would be a technical question determined by the applicant and the EPC staff based on the existing agricultural practices in Hillsborough County. If a project is determined by staff to be a bona fide agricultural activity then constructing an access road through a wetland within the limits of the exemption could be approved pursuant to the exemption. *Answered by EPC staff*

QUESTION

- 3) Will it be the applicant or the EPC staff who determines what is necessary and normal and customary for the area? Will this invite legal challenge?

ANSWER: The applicant has the burden of proving entitlement to an authorization or exemption. The applicant must provide the necessary information and the staff will then determine if the application meets the rule criteria. The staff will ultimately determine entitlement to the authorization under the rule. The applicant may administratively challenge the decision and the matter will be transferred to an appointed Hearing Officer who will make a recommendation to the EPC board concerning findings of fact and conclusions of law. Again, in an administrative proceeding, the burden would be on the applicant to prove the entitlement. This proposed language will not invite any more legal challenges than what is already included in the rule. *Answered by EPC staff*

QUESTION

- 4) The existing “reasonable use” review already takes into consideration a variety of factors when determining allowable impacts to wetlands. Is it true that this standard currently applies to *all* uses? Is it true that applicants for all uses have the same opportunity to challenge an authorization? Is it true that we *already* provide the opportunity for variance or waivers for hardships? Why, then, do we need to provide a different standard for agriculture?

ANSWER: The existing rule does consider “reasonable use” for all types of uses resulting in wetland impacts except for wetland impacts authorized under the “miscellaneous activities in wetlands” Section 1-11.10. Any party adversely affected by any decision of the Executive Director has the opportunity to challenge the decision. The EPC administrative rule also includes provisions for waivers and variances. The different standard for agriculture was presented in the Hybrid Model that was proposed by staff and approved by the EPC board in August 2007. First, wetland impacts arising out of agricultural activities are often different than other development activities in wetlands. In addition, the AGSWM program provides certain incentives to avoid wetland impacts that are not applicable to other development activities. Finally, economic considerations related to “reasonable use” are different for agricultural activities. Each of these differences justifies a different standard for bona fide agricultural activities in Hillsborough County. *Answered by EPC staff*

QUESTION

- 5) Must a “bona fide agricultural activity” be a viable commercial venture? Or can it be a private use?

ANSWER: Bona Fide Agriculture means a “good faith agricultural use of the land” (Chapter 193.461, F.S.). The use must be a commercial activity. *Answered by Steve Gran - Hillsborough County Agriculture Economic Development Council*

QUESTION

- 6) Must a “bona fide agricultural activity” be conducted on agriculturally zoned land or can it occur on residentially or commercially zoned property that is granted a greenbelt classification? If greenbelt is allowed – how do you justify allowing impacts on commercial property with an Ag use but not on commercial property proposed for development? What about applicants who rezone property but keep “Ag” as an interim use? Do they get impacts under the interim use that would not be allowed under the approved future use?

ANSWER: The land use designation of the property is not relevant to the determination whether the activity qualifies under the proposed exemption. It must only be an activity that is determined to be a bona fide agricultural activity. *Answered by EPC staff*

QUESTION

- 7) Have there been any meetings with Planning Commission and PGMD staff to determine what impact, if any, this would have on the application of their provisions and regulations? What land use regulations are in place that would serve to discourage the premature conversion of agriculture to development if environmental regulations are relaxed? Are there any?

ANSWER: Yes. PGMD staff currently review land development projects specifically for agriculture and request comment from the EPC on those activities. This process would continue and the proposed changes in EPC Rule 1-11 would not interfere with the County’s ability to process exemptions for agriculture as currently provided under those rules. Other natural resource requirements such as setback, tree protection and other land development criteria such as stormwater and flooding restrictions are unaffected by any new EPC requirements and in some instances these requirements are different for agriculture than other development activities. Further, requirements for zoning changes that may deter the conversion of land from agriculture to development would be unaffected by changes to the EPC rule. The EPC has not consulted the Planning Commission on the proposed amendment. *Answered by EPC staff*

QUESTION

- 8) The proposed amendment refers to an application for impacts—why is no type of application, fee, or timeframe identified.

ANSWER: Provisions in the proposed rule provide for application of the criteria through the miscellaneous activities process and possibly mitigation review each of which has specific application and fee structures as provided elsewhere in EPC rule.
Answered by EPC staff

Section 1-11.12 (a) Reasonable Use exemption:

QUESTION

- 1) Once again, the existing “reasonable use” review already takes into consideration a variety of factors when determining allowable impacts to wetlands. Is it true that this standard currently applies to *all* uses? Is it true that applicants for all uses have the same opportunity to challenge an authorization? Is it true that we *already* provide the opportunity for variances or waivers for hardships? Why, then, do we need provided a different standard for agriculture?

ANSWER: See response to number 4 above. *Answered by EPC staff*

QUESTION

- 2) What are the criteria for determining whether an applicant does or does not qualify for a National Resource Conservation Service (NRCS) Resource Management System (RMS) plan or a state SWFWMD RMS plan? Are they the same? How often do they change? Will the proposed amendment adopt a specific set of criteria or will the criteria be in constant flux? AGSWM is not a codified rule, it is an incentive program and therefore subject to change without public notice or input. Will EPC have any authority over changes to the provisions in the program? Will there be any public notice if and when the criteria changes?

ANSWER: Criteria for an RMS plan are primarily a series of water and land conservation requirements and best management practices applicable to the geographic area and to the farming activity and includes setbacks from wetlands, habitat strips, edge-credits, flooded field credits, proximity to forest cover credits, nutrient controls and pesticide controls. The NRCS determines whether an applicant qualifies for the federal RMS based in part on a requirement of no impact to wetlands. Federal requirements are somewhat different from state standards where impacts to smaller < ½ acre isolated wetlands can be allowed. Once in place the approved RMS plan does not change without a formal request to modify the proposed activity.

The basic premise of the AGSWM program for purposes of the EPC Wetland Rule is currently to be eligible for AGSWM under the existing laws the applicant must reduce wetland impacts to a very limited amount. In addition, an applicant must utilize a conservation plan that is intended to ensure no offsite wetland impacts occur and the farm is designed in an environmentally sensitive manner. No specific criteria will be proposed to be included in the EPC Wetland Rule. In the event the AGSWM program changes in the future the EPC could amend the EPC Wetland Rule to address undesirable changes to AGSWM. Any future amendments to the Wetland Rule would be publicly noticed. *Answered by EPC staff*

QUESTION

- 3) As the language implies, wetland impacts, if permitted, are allowable under these RMS plans. The Federal RMS plan would incorporate impacts permitted by another agency such as DEP or EPC and the SWFWMD RMS plan would incorporate impacts that are permitted under their regulations. Since the implication is that permitted impacts would be part of these RMS plans, is there a size threshold? ¼ acre? ½ acre? or greater?

ANSWER: The EPC approval of the reasonable use exemption under section (a)(i) does not set a threshold for wetland impact except in reference to an approved AGSWM exemption. In order to qualify for the Federal RMS a threshold of “no wetland impact” is required while under the State AGSWM exemption impacts to isolated wetlands up to ½ acre in size is allowed. *Answered by EPC staff*

QUESTION

- 4) Can an applicant claim impacts under provisions (ii) and (iii) thereby receiving an exemption for impacts greater than a ½ acre?

ANSWER: Not under the current rule amendment draft. The rule has been re-drafted to clarify that the exemption only applies under subsection (iii) up to ½ acre total wetland impact. *Answered by EPC staff*

Section 1-11.12 Mitigation Exemptions

QUESTION

- 1) Provision (i) limits impacts to ¼ acre isolated wetlands with a total not to cumulatively exceed ½ acre on the *agricultural land*. How do you define Ag land? Is this zoning? Or is it the land area used for the “bona fide agricultural activity”? The terms *agricultural land* and *agricultural activity* are not synonymous. Does this

mean that the mitigation exemption would apply to property not utilized for a “bona fide agricultural activity”?

ANSWER: “Agricultural land” is defined as the area of land that would be included for use for the bona fide agricultural activity. The agricultural land is the area where the agricultural activity takes place. *Answered by EPC staff*

QUESTION

- 2) Provision (ii) states that mitigation must occur in Hillsborough County; however, if EPC must accept the DEP’s Environmental Resource Permit mitigation, how would that be enforceable if EPC has no input in determining what would be appropriate and acceptable mitigation? DEP regulations do not require mitigation within the County where the impacts occur.

ANSWER: The EPC will not accept the FDEP or WMD mitigation if it is not located within the county boundary. The exemption would not apply and different mitigation would need to be proposed by the applicant pursuant to the existing rule section 1-11.08. *Answered by EPC staff*

QUESTION

- 3) Provision (iii) states that the “wetland impact area” must remain in an agricultural use (note: the term “bona fide” is not included) for seven years from the date of impact. Does this mean only the wetland area (¼ acre, ½ acre, etc.) must remain in an Ag use while the remainder of the property can convert to other uses before the seven year timeframe expires? If so, then this time restriction is useless and only serves to encourage the premature conversion of agricultural land to other types of development. This does not serve to ensure a good faith commitment from the agricultural community to use the land for farming, it does not serve to ensure that agriculture will remain an economically viable industry in Hillsborough County, nor does it justify the weakening of our existing regulations for an industry not willing to make a *good faith* commitment.

ANSWER: Only the wetland impact area where the bona fide agricultural activity is taking place or where it took place need remain unchanged for seven years. The EPC cannot restrict activities beyond the area it is regulating. The proposed rule language does not encourage the wetland area to be converted because it specifically cannot be converted under the proposal for seven years without conducting mitigation. Requiring a farmer to mitigate a wetland that would otherwise be exempt under the rule because he or she adds an extra room to their residence, or adds a garage, or sells off an unrelated 40 acre portion of the farm for development is not supported by logic

and does not reflect the intent of the proposed rule. The specific wetland impact area may not be converted though under this proposed language. *Answered by EPC staff*

QUESTION

- 4) Provision (iii), at a minimum, should require a ten year commitment. Why seven years?

ANSWER: Seven years was suggested because it was longer than one could reasonably expect to obtain the necessary permitting to convert an area to non-agricultural use, and thus utilize the exemption as a loophole, but was not so long as to be an undue burden to the agricultural community in Hillsborough County. *Answered by EPC staff*