

**NATIONAL WILDLIFE FEDERATION  
CONSERVANCY OF SOUTHWEST FLORIDA  
AUDUBON OF FLORIDA  
AUDUBON OF SOUTHWEST FLORIDA  
COLLIER COUNTY AUDUBON SOCIETY  
COPPERLEAF  
CORKSCREW RURAL COMMUNITY PLANNING COMMITTEE  
DEFENDERS OF WILDLIFE  
ESTERO CIVIC ASSOCIATION  
ESTERO COUNCIL OF COMMUNITY LEADERS  
FLORIDA WILDLIFE FEDERATION  
LIGHTHOUSE BAY AT THE BROOKS  
PEACE RIVER AUDUBON SOCIETY  
RESPONSIBLE GROWTH MANAGEMENT COALITION  
SANIBEL-CAPTIVA AUDUBON SOCIETY  
SHADOW WOOD COMMUNITY ASSOCIATION  
SIERRA CLUB  
SPRING RUN AT THE BROOKS**

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Re: Agripartners and Edison Farms Site: South Lee Conveyance §404 Permit and  
ESA Consultation Requirement and On-going Enforcement Actions

Dear Ms. Gaffney-Smith, Mr. Summa, Mr. Bergmann, Mr. Giattina, and Mr. Souza:

The National Wildlife Federation (NWF), Florida Wildlife Federation (FWF), Conservancy of Southwest Florida, Audubon of Florida, Audubon Of Southwest Florida, Collier County Audubon Society, Copperleaf, Corkscrew Rural Community Planning Committee, Defenders Of Wildlife, Estero Civic Association, Estero Council Of Community Leaders, Florida Wildlife Federation, Lighthouse Bay At The Brooks, Peace River Audubon Society, Responsible Growth Management Coalition, Sanibel-Captiva Audubon Society, Shadow Wood Community Association, Sierra Club, and Spring Run At The Brooks are strongly opposed to Agripartners/Edison Farms' (Agripartners) plans to construct a drainage ditch through wetlands along the western and southern boundaries of their property in the Estero River and Halfway Creek watersheds, Lee County, Florida.

We are particularly opposed to Agripartners' apparent intention to ditch and drain wetlands without a Clean Water Act (CWA) §404 permit, Endangered Species Act (ESA) §7 consultation, and National Environmental Policy Act (NEPA) environmental review. As you know, Agripartners has a history of attempting to clear, drain, and develop its extensive land holdings without subjecting its development plans to federal environmental scrutiny and permitting safeguards. *See e.g.*, Letter from NWF and FWF dated March 8, 2004 and attached newspaper articles; Letter from NWF and FWF dated March 12, 1999 (both attached). Agripartners has also been the subject of several enforcement actions over the past few years and is currently under investigation by the Corps itself. *See* Riddhi Trivedi-St. Clair, "Edison Farms seeks approval for drainage ditch on wetlands," March 20, 2005 Naples Daily News, at [http://www.naplesnews.com/npdn/bonitanews/article/0,2071,NPDN\\_14894\\_3636954,00.html](http://www.naplesnews.com/npdn/bonitanews/article/0,2071,NPDN_14894_3636954,00.html) (attached).

Specifically, we are concerned that Agripartners will improperly claim that its ditching does not constitute a discharge of dredged material subject to § 404, and then

improperly bypass the § 404 permit, ESA consultation, and NEPA review requirements. As explained more fully below, Agripartners will discharge dredged material in the course of excavating four miles of ditches, and therefore it must comply with these federal environmental laws.

We urge you now, as we have in the past, to live up to your responsibilities under the CWA, ESA, and NEPA by proactively investigating Agripartners' South Lee Conveyance plans and directing Agripartners to seek and secure a §404 permit and to consult with FWS in accordance with the CWA, ESA, and NEPA *before* moving any more dirt in wetlands on its property. In addition, we urge each of you to thoroughly investigate Agripartners' CWA and ESA violations and to ensure that Agripartners does not benefit from these violations

### **Project Description and Wetland Impacts**

Agripartners received a Florida Environmental Resource Permit (ERP) from the South Florida Water Management District (SFWMD) for a "South Lee Conveyance" (Permit No. 36-06077-P) on December 14, 2006. Lee County and the Conservancy of Southwest Florida have formally appealed the ERP. The ERP and the SFWMD Staff Report, signed December 11, 2007, may be found on line at <http://my.sfwmd.gov/ePermitting>. This SFWMD Staff Report is referenced here.

The property at issue is located at S1, 12/T45/R25 and S5, 6, 7, 8/T47/R26, just east of I-75 and west of Corkscrew Regional Ecosystem Watershed (CREW) Trust land in Lee County. This property is identified in the Southwest Florida Environmental Impact Statement (FEIS) as an area supporting several important resources of special concern, including the endangered Florida panther and wood stork. *See* SFWMD Staff Report at 2, 6; FEIS and Record of Decision at Appendix H, at [http://www.saj.usace.army.mil/permit/hot\\_topics/SFLAEIS/contents.htm](http://www.saj.usace.army.mil/permit/hot_topics/SFLAEIS/contents.htm) (last visited January 30, 2007).

According to Agripartners' submission, the project area on the site is 198.85 acres, 154.96 (78%) of which are wetlands. Of these wetland acres, at least 15.76 acres will be directly destroyed through excavation of four miles of ditch along the south and west boundaries of the Agripartners property to convey water from the site downstream to Halfway Creek and Estero River. SFWMD Staff Report at 2. *See also* Wetland impact chart at SFWMD Staff Report, p. 33 (additional borrow area wetland impacts bring total direct wetland impact to 32.2 acres). These directly impacted wetlands include pond and bald cypress wetland complexes. *Id.* at 3.

The proposed drainage ditch will also drain at least another 72 acres of wetlands, destroying essential foraging habitat for wood storks and other wetland-dependent species:

Additional secondary impacts to wetland functions are anticipated to occur as a result of increased drainage of wetlands in the vicinity of the

proposed conveyance ditch. It is anticipated that the increased drainage will shorten the wetland hydroperiods and provide conditions which are more suitable to infestation by melaleuca and other exotic species.

*Id.* at 3-4.

Despite promised efforts to control resulting infestation, “[a] shortened hydroperiod will nonetheless result in less foraging habitat for wetland-dependent species during dryer [sic] times of the year. Wetlands within this 150-foot wide zone of anticipated increased drainage total approximately 72.3 acres.” *Id.* at 4. We believe the Staff Report underestimates the wetland drainage associated with this ditch work and completely ignores additional impacts to downstream water quality and flood storage. Comprehensive federal review is warranted for this project, other site development work in wetlands on the Agripartners site, and the cumulative adverse environmental effects of wetland drainage and filling in the Estero River and Halfway Creek watersheds.

#### **Agripartners’ Drainage Ditch Requires a Section 404 Permit.**

A §404 permit is required for any discharge of dredged material into waters of the United States. “Discharge of dredged material” includes:

... any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

33 CFR 323.2 (d)(1).

“Incidental fallback” is limited to the redeposit of small volumes of dredged material that fall back to “substantially the same place as the initial removal,” such as the “backspill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.” 33 C.F.R. 323.2(d)(2)(ii).<sup>1</sup> Fallback of dredged material even small distances from the spot of removal, such as into wetlands along the side of the ditch, is not incidental fallback, but a

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<sup>1</sup> The U.S. District Court for the District of Columbia has just issued a brief opinion invalidating the 2001 definition of discharge of dredged material. However, this decision may be appealed and, in any event, the defects of concern to the Court (volume and time material is held) are not central to finding that Agripartners’ excavation is subject to §404 regulation. See, *National Association of Homebuilders v. U.S. Army Corps of Engineers*, Civ. No. 01-0274 (D.D.C. January 30, 2007). Furthermore, invalidation of the existing rule reinstates the previous rule, including 1999 rule amendments. See *Georgetown University Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987), *aff’d*, 488 U.S. 204 (1988). The 1999 rule similarly regulates “[a]ny addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.” § 323.3(d)(1)(iii) (emphasis added).

discharge of dredged material. *See e.g.* Preamble to Final Rule on the Regulatory Definition of Discharge of Dredged Material, 66 Fed. Reg. 4550, 4553, 4558, 4566.

Based on our examination of the SFWMD Staff Report, it is evident that Agripartners intends to use mechanized earth-moving equipment to ditch and channelize a four mile "canal," excavating wetland soils from at least 15.76 acres of wetlands. Absent modified excavation equipment and specialized excavation techniques, this excavation work will result in large volumes of dredged material being dumped some distance from the spot of initial removal. As the Corps notes, "backhoes by their nature (i.e., the size of the excavation machinery) are typically used to move more than small volumes of material in the course of excavation, and are thus likely to result in redeposits that exceed the definition of incidental fallback (i.e., "small volumes of dredged material ... [that] ... falls back to *substantially the same place* as the initial removal.") 66 Fed. Reg. at 4563.

In addition, sidestepping or stockpiling of dredged material in wetlands or other waters of the U.S. is clearly a regulable discharge under either the 2001 rule or its predecessor. *Id.* The SFWMD Staff Report includes project plans indicating permanent stockpiles that are located immediately adjacent to the ditch, and appear to be in existing wetlands. *See* SFWMD Staff Report at Exs. 2.10, 2.11, 2.12 at 27-29; wetland impact sketches at 31-32.

The Corps and EPA consider the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material *unless* project-specific evidence shows that the activity results in only incidental fallback. 33 C.F.R. 323.2(d)(2)(i). In the Preamble to the rule, the agencies state in no uncertain terms that they will "carefully evaluate" whether there is movement of dredged material away from the place of initial removal. 66 Fed. Reg. at 4553:

In doing so, we will look to see if earthmoving equipment pushes or relocates dredged material beyond the place of excavation, as well as whether material is suspended or disturbed such that it is moved by currents and resettles beyond the place of initial removal.

....

The SFWMD Staff Report plans do not include any details indicating or requiring the modified use of mechanized earth-moving equipment to avoid discharges of dredged material. The Pollution Prevention Form, Ex. 4.0 at 67, identifies ditch excavation and stockpiling as sedimentation and erosion-producing activities, but the description of excavation activity does not indicate any measures to ensure that discharges are limited to incidental fallback. In light of the strong likelihood that Agripartners will move large volumes of dredged material away from the initial spot of excavation, Agripartners must obtain a §404 permit.

**The Corps and EPA Must Require Agripartners to Apply for a §404 Permit to Ditch and Drain Wetlands.**

To satisfy its own regulations, the Corps and EPA must carefully evaluate whether Agripartners ditching project will result in a discharge of dredged material and it must require Agripartners to obtain a §404 permit for its ditching. Particularly in light of Agripartners' past violations and on-going enforcement actions, it is not reasonable for the Corps and EPA to sit back and wait to see if Agripartners' ditch digging results in an unpermitted discharge of dredged and fill material.

When the Corps and EPA issued their discharge of dredged material rule, they made a commitment to carefully monitor permitted and unpermitted activities to verify compliance with permit conditions and to ensure that no unpermitted regulable discharge takes place. 66 Fed. Reg. at 4567-4568. EPA shares in this responsibility. *Id.* at 4568. The Corps and EPA must require Agripartners to conduct its ditch digging, if at all, in compliance with the Clean Water Act.

**Agripartners May Not Conduct Excavation or Otherwise Destroy Habitat of the Endangered Wood Stork and Florida Panther Without FWS Consultation or Permission.**

The SFWMD Staff Report not only acknowledges that Agripartners' ditching will harm endangered wood stork and panther habitat, it includes a Special Condition 20 requiring Agripartners to coordinate with FWS to avoid impacts to these federally endangered species. SFWMD Staff Report at 15. FWS has a legal duty to conserve these protected species and must require Agripartners to modify its ditch work to avoid harm to them. *See* Endangered Species Act, 16 U.S.C. §§1531 (c)(1), 1536, 1538, 1539.

*Even if* Agripartners could legitimately avoid §404 permit review and ESA §7 consultation (which it cannot), it cannot avoid liability for harm to endangered wood storks and panthers and their habitat. ESA §9 makes it unlawful for "any person," including any federal, state, or local governmental entity, to "take" an endangered species. The term "take" is broadly defined by the ESA to encompass activities which may "harass," "harm," "pursue," "wound," or "kill" any endangered species. 16 U.S.C. § 1532(19). The Service has defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3; *see also* *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 115 S. Ct. 2407, 2418 (1995).

Wetland ditching and drainage of the Agripartners site will almost certainly result in "significant habitat modification or degradation" which will "significantly impair essential behavioral patterns, including breeding, feeding or sheltering," and thereby harm panthers and wood storks within the meaning of the ESA and implementing regulations. These practices likely to be conducted by Agripartner will violate ESA §9 and must be prohibited.

The Water Management District may also be liable for §9 violations by permitting these practices on the Agripartner site or by promoting changes in drainage patterns on or adjacent to the site. *See, e.g., Loggerhead Turtle v. Council of Volusia Cty., Fla.*, 148 F.3d 1231, 1239 (11th Cir. 1998) ("the regulatory acts of governmental entities can cause takes of protected wildlife" because the "regulatory entity purports to make lawful an activity that allegedly violates the ESA."). We believe FWS should also investigate the role of the Water Management District in designing, approving, or otherwise promoting habitat alterations on or adjacent to the Agripartners site that may constitute ESA §9 violations.

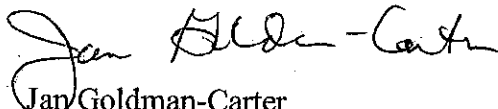
We urge FWS to immediately launch a §9 investigation and pursue an enforcement action if activity on or adjacent to the Agripartner site harms wood storks or panthers. Moreover, FWS must consider the cumulative adverse impacts of the loss in panther and wood stork habitat that would directly or indirectly result from the ditching and draining of wetlands on the Agripartners site.

### **Conclusion**

For the reasons set forth above, and based on the information referenced herein and attached, we urge the Corps, EPA, and FWS to notify Agripartners that it may not proceed with its ditching plans unless and until it has resolved its existing CWA and ESA violations and been granted a §404 permit and FWS permission in accordance with the CWA, the §404(b)(1) Guidelines, and the ESA. Please contact Jan Goldman-Carter at 202-797-6894 regarding your actions to address these concerns and any questions or comments regarding the same.

Thank you for your careful attention to this important matter.

Sincerely,



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Greg Peck, EPA Office of Water

**Attachments:**

- A. Letter from NWF and FWF dated March 8, 2004 and attached newspaper articles.
- B. Letter from NWF and FWF dated March 12, 1999
- C. Riddhi Trivedi-St. Clair, "Edison Farms seeks approval for drainage ditch on wetlands," March 20, 2005 Naples Daily News