

CHAPTER 5M-1

DIVISION OF AGRICULTURAL WATER POLICY

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COMMENTS

General comments regarding concept of "enrollment means a site visit has occurred and FDACS has indicated what 'proper implementation' entails for the specific parcel."

- At first glance, this can sound like it's slowing the process down—meaning that instead of enrollment happening upon submittal of an NOI, enrollment doesn't happen until the site visit, potentially up to two years later.
- Under the 5M-1 changes, the specifics for what must happen for "proper implementation" are determined at the initial site visit, which can be up to two years after the NOI submittal. Presumably, that is when the landowner would begin to implement the BMPs, to be confirmed through at the next biennial site visit. This is another part of the new 5M-1 concept that appears to be slowing the process down—up to four years from submittal of the NOI to an implementation site visit that would actually be confirming proper implementation of BMPs.
- Current BMAP practice is to credit reductions upon enrollment. Under this change, DEAR would face much less criticism. Currently, we credit reductions when the NOI is submitted (i.e., the current definition of enrolled). If enrollment means an onsite implementation verification visit has happened, DEAR is in a stronger position crediting "enrolled" parcels for reductions.
- Following this rule change, those parcels with existing NOI that have not yet had a site visit will cease to be considered enrolled. This will drastically change the credited reductions in the existing BMAPs, since the number of parcels with NOI is significantly higher than the number of parcels with onsite implementation verification.
- It seems that a term will be needed for "parcels where an NOI has been submitted but are not yet enrolled because an onsite implementation verification has not occurred." These are the ones that will no longer have credited reductions in the BMAPs under the 5M-1 changes.
- If the new 5M-1 process is implemented as proposed, it would make sense to revise the BMP manuals to be more self-explanatory, and to require some minimum level of BMPs to begin immediately upon NOI submittal. Compliance with the BMP minimums could then be determined at the first implementation site visit, with any additional elements necessary for "proper implementation" identified at that time. Perhaps the land use, acreages, and activity data from FSAID could be useful in putting producers on notice with respect to the need to begin implementing BMPs upon NOI submittal (if not upon BMAP adoption).

5M-1.001 Definitions.

(1) "Applicable Best Management Practices" or "Applicable BMPs" means best management practices that have been adopted by Department rule and have been identified for implementation on an Enrolled parcel ~~in an Enrolled Producer's or Landowner's current Notice of Intent.~~

(2) "Basin Management Action Plan" or "BMAP" means a plan adopted by the Florida Department of Environmental Protection pursuant to Section 403.067(7)(a), F.S.

(3) "DEP" means the Florida Department of Environmental Protection.

(4) "Department" means the Florida Department of Agriculture and Consumer Services (FDACS).

(5) "Enrolled" means the status of a Producer or Landowner who has an active ~~completed a~~ Notice of Intent for implementation of the Applicable BMPs ~~best management practices on specified parcels~~ identified during a site visit with Department representatives, or who qualifies as a Temporarily Inactive Operation for the purposes of Rule 5M-1.010, F.A.C. If the Producer is not the Landowner, the Department will notify the Landowner of the date of enrollment and Applicable BMPs that are required to be properly implemented on the subject parcel.

COMMENTS

- How will the landowner notification by FDACS be accomplished? There has been considerable difficulty encountered by both agencies in identifying and notifying landowners. A method or procedure should be added to the rule, so that producers and landowners will have a better concept of what to expect.
- “Applicable BMPs” is defined above and references the term “Enrolled,” so these definitions appear circular.

(6) “Landowner” means the owner of real property of record in the county where a parcel of land is situated. Landowners may also be Producers, as defined herein.

(7) “Notice of Intent” or “NOI” means a form provided by the Department to be submitted by an agricultural Producer or Landowner to indicate intent to enroll in and properly implement the Department’s program of best management practices in accordance with the manual under which they enroll. A Notice of Intent to Implement Best Management Practices (FDACS-04002, 10/20), hereby incorporated by reference, shall be submitted for all new enrollments to the Florida Department of Agriculture and Consumer Services, Office of Agricultural Water Policy, Mayo Building, 407 South Calhoun Street, Tallahassee, Florida 32399. The NOI may be obtained from FDACS or accessed online at <http://www.flrules.org/Gateway/>. Submittal of an NOI shall not result in enrollment until such time as a site visit is completed by the Producer and Department representatives to identify the Applicable BMPs to be implemented on the subject parcel. A Producer or Landowner that has submitted an NOI and has not undertaken the required site visit will not be reported as unenrolled to the Florida Department of Environmental Protection unless they fail to undertake the required site visit within 60 days after notification by the Department of scheduling availability.

COMMENTS

- How will the notification by FDACS of scheduling availability be accomplished? A method or procedure should be added to the rule, so that producers will have a better concept of what to expect.
- The rule should have a time commitment by FDACS to schedule or complete the site visit (or at least to provide notice of scheduling availability).
- The language about “will not be reported as unenrolled to DEP unless...” is confusing. “Will not be reported as unenrolled” means de facto that the producer is enrolled, and if the producer hasn’t had a site visit yet, the producer is not “enrolled.” This isn’t internally consistent. Creation of a term and process for “pending enrolled” or something might help clarify this language, too. A term meaning the NOI has been submitted, initial BMPs have been implemented, but site visit has not yet occurred to confirm proper implementation.]

(8) “Producer” means any person or other legal entity engaged in agriculture as defined in Section 570.02(1), F.S.

COMMENTS

- Should the rule include something about how FDACS is determining who is supposed to be implementing the BMPs? Perhaps this could help get the discussion started regarding (e.g.) hobby farms claiming ag exemptions and counties allowing it?
- Perhaps this definition could be changed to read “any person or legal entity engaged in, or owning real property upon which occurs, agriculture as defined in Section 570.02(1), F.S.” That would seem to match how we’re currently implementing the program.

Rulemaking Authority 403.067(7)(c)2., 403.067(7)(d)2.c., 570.07(10), 570.07(23) FS. Law Implemented 403.067(7)(d)2.c. FS. History—New 11-1-17.

5M-1.008 Implementation Verification.

(1) The Department will conduct a site visit at least every two years to verify the proper implementation ~~record implementation status assessments~~ of Applicable BMPs-Best Management Practices (BMPs) by Enrolled Producers or Landowners, using data from site visits, periodic producer self-verifications, and staff-assisted verifications, supplemented by information from other sources

~~including county property appraisers, DEP, and water management districts. If the Producer is not the Landowner, the~~ The Department will notify the Landowner when an Enrolled Producer's site visit, ~~self verification, or staff assisted verification~~ is completed for the specified parcels. ~~if the Producer is not the Landowner. The Department will notify DEP of any Producer or Landowner that fails to cooperate with the Department to complete an implementation verification site visit within 60 days of contact by Department representatives.~~

COMMENTS

- The supplementary information from other sources can be important for verification process; it should still be included here instead of being struck.
- DEP and FDACS need to work on this enforcement referral concept. Simply forwarding an uncooperative producer or landowner to DEP will drag the process out, with the eventual remedy being FDACS coordinating with the producer to conduct the implementation verification site visit. There seems to be a need for some additional outreach steps before referral to DEP enforcement beyond simply "60 days have passed since we notified the producer that we were available for a site visit."

(2) During the implementation verification site visit, the Department will collect and review any records required by the manual under which the parcel is enrolled to verify the proper implementation of Applicable BMPs for an Enrolled parcel.

(3) During the implementation verification site visit, the Department will collect and retain records regarding the application of nitrogen and phosphorus on the Enrolled parcel. Producers shall provide the required records through the utilization of the Nutrient Application Record Form (FDACS-04005, 10/20), adopted herein by reference and available at <http://www.flrules.org/Gateway/>, or a substantially similar form containing the following information pursuant to the Enrolled parcel:

(a) Manual of Best Management Practices in which the producer is enrolled, including the identification of separate commodities if there are multiple enrollments under a specific manual;

(b) Month(s) and year that nutrient application occurred;

COMMENTS

- "Year" should be "year(s)" since the site visit is every other year and the information will likely span multiple years.

(c) Type of nutrient source utilized;

COMMENTS

- If manure is the source, then the type should be specified as well. The "NARF" that will be used to collect the fertilizer application data contains a column for "nutrient source" and a column for "other nutrient source description." There are no instructions on the NARF for the "other nutrient source description" column. The instructions could say that if "other" or "manure" is selected, the description must identify the source, and that if "manure" is selected, the description must identify the type. It would be helpful to also have that requirement in the rule (i.e., here, and not just in the form).

(d) Total amount of nitrogen applied in pounds;

(e) Total amount of phosphorus as P2O5 applied in pounds; and,

(f) Total acreage over which nitrogen or phosphorus as P2O5 was applied.

COMMENTS

- The rule and form should require collection of nutrient application method as well.
- It would be useful to know over which particular acreage the N or P was applied, not just the total acreage where something was applied. This would allow FDACS to confirm proper implementation with respect to application rates. DEP understands that the aggregated data will not identify individual parcel acreage or individual parcel application rates.

~~(4)(2)~~ Section 403.067(7)(c)5., F.S., provides that agricultural records, defined therein, are confidential and exempt from public records disclosure.

~~(5)(3)~~ For the Producers or Landowners described below in paragraph (a), (b), or (c), verification of implementation of the Applicable BMPs~~Best Management Practices~~ will be confirmed by:

(a) Compliance with the following permits, as determined by the issuing agency:

1. Permits or authorizations issued by DEP under rule Chapter 62-670, F.A.C., or
2. Permits or authorizations issued by the South Florida Water Management District under rule Chapter 40E-63, F.A.C.

(b) Compliance with the terms of conservation easements, leases, or other binding agreements with a state agency or water management district that require implementation of the Department's BMPs and include annual onsite verification by the state agency or water management district that BMPs are being implemented, or

(c) Compliance with the requirements of proprietary certifications issued by Department qualified non-governmental entities as provided in subsection ~~(7)(5)~~.

~~(6)(4)~~ A Producer's or Landowner's proof of compliance with any of the permits, agreements, or certifications presented by the issuing agency, as provided in subsection ~~(5)(3)~~, shall be made available to the Department upon request.

~~(7)(5)~~ Entities seeking to issue proprietary certifications for use in accordance with paragraph ~~(5)(3)(c)~~, must request a qualification review by the Department's Office of Agricultural Water Policy. Applicants will be required to demonstrate the following qualification requirements:

(a) Certification standards that incorporate implementation of the Department's BMPs;

(b) A process to license or authorize inspectors or auditors who shall not be employed by or affiliated with the standard-setting entity;

(c) A process for revocation of licenses or authorizations for inspectors or auditors;

(d) Procedures or protocols for selection of inspectors or auditors who shall not be employed by or affiliated with the Producers or Landowners holding or seeking certification for their operations;

(e) An annual certification review and renewal process that includes a site inspection by the licensed or authorized inspector or auditor; and,

(f) A certification revocation process if the Producer or Landowner is found to be out of compliance with the entity's certification standards.

~~(8)(6)~~ Implementation verification of Best Management Practices for Silviculture shall be provided in accordance with Chapter 5I-6, F.A.C.

Rulemaking Authority 403.067(7)(c)2., 403.067(7)(d)2.c., 570.07(10), 570.07(23) FS. Law Implemented 403.067(7)(d)2.c. FS. History—New 11-1-17.

5M-1.009 Best Management Practices Implementation Assistance.

(1) The Department will provide implementation assistance to Enrolled Producers or Landowners as follows:

(a) If the implementation verification site visit~~status assessment~~ described in subsection 5M-1.008(1), F.A.C., indicates that an Enrolled Producer has not achieved properfull implementation of Applicable ~~(BMPs)Best Management Practices (BMPs)~~, the Department will work in cooperation with the Producer or Landowner to identify corrective measures to be taken to achieve properfull implementation of Applicable BMPs. The identification of corrective measures will include setting of expectations andfor the time required to complete them. In no case shall the timeframe for completion of corrective measures extend beyond the date of the next implementation verification site visit. If the Producer is not the Landowner, the Landowner will be notified that corrective measures have been identified for the Producer's implementation.

COMMENTS

- Lack of proper implementation should in all cases require corrective measures and a reinspection within a specified, short window, rather than simply within the normal two-year window.
- At a minimum, the timeframe should read something like "The timeframe for completion of corrective measures must be as soon as practicable, but in no case can it extend beyond the date of the next implementation verification site visit."

- The change from "full implementation" to "proper implementation" is consistent with the statutory language. But, making this change has eliminated the concept of "full," and there is not a definition of "proper" in the rule. There should be a definition of proper, and the definition should include the concept of full implementation.

(b) If the Producer does not implement the identified corrective measures, the Department will ~~work in cooperation with the Producer and Landowner, if the Producer is not the Landowner, to~~ identify remedial measures to be taken by the Producer and, if necessary, the Landowner to achieve ~~proper~~full implementation of Applicable BMPs. The identification of remedial measures will include setting of expectations ~~and for~~ the time required to complete them. In no case shall the timeframe for completion of remedial measures extend beyond the date of the next implementation verification site visit. A Producer or Landowner that fails to implement the identified remedial measures will be subject to subsection (2).

COMMENTS

- The distinction between corrective and remedial measures is nuanced and not necessarily readily apparent from the rule language. DEP understanding is that the corrective versus remedial actions may not differ. It's the enforcement remedy that differs. The corrective actions act as a "fix it ticket" the first time, and more formal enforcement if that doesn't address the problem. In addition, corrective measures are intended to be consensus between DACS and producer, and remedial measures are intended to be dictated by DACS. These concepts would be more clear with definitions of "corrective measures" and "remedial measures."
- Similar concerns here regarding the timeframe allowed for implementation of the remedial measures and a reinspection by FDACS to confirm compliance. Under current 5M-1 language, could take **eight years or more** to get producers implementing their BMPs. (Two years from NOI submittal to first site visit where proper implementation is defined; two more years to second site visit where proper implementation is checked and corrective measures are identified; two more years to third site visit where corrective measures are checked and remedial measures are identified; and two more years to fourth site visit where remedial measures are checked and presumably producer is referred to DEP for enforcement.)

(c) A Producer or Landowner that does not cooperate with the Department to identify corrective or remedial measures will be subject to subsection (2).

(2) The Department will notify DEP within 60 days after the date of scheduled completion of remedial measures identified pursuant to paragraph (1)(b), of any Enrolled Producer or Landowner that refuses or fails to implement Applicable BMPs.

NOTES

- This should indicate "refuses or fails to 'properly' implement Applicable BMPs."
- DEP should also be notified whenever corrective or remedial measures have been required of a producer or landowner.

(3) Producers and Landowners in a BMAP area are required by Section 403.067, F.S., to implement agricultural BMPs or other management strategies. The Department will provide Producers and Landowners in a BMAP area the opportunity to enroll and implement BMPs and will notify DEP of any Producers and Landowners that do not enroll in accordance with Department rules.

Rulemaking Authority 403.067(7)(c)2., 403.067(7)(d)2.c., 570.07(10), 570.07(23) FS. Law Implemented 403.067(7)(d)2.c. FS. History—New 11-1-17.

5M-1.010 Temporarily Inactive Operations.

(1) To qualify as a Temporarily Inactive Operation under the best management practices (BMP) programs listed in subsection (2) or (3) of this rule, an agricultural producer must:

(a) Have been engaged in active agricultural production on parcels for which temporarily inactive status is being sought within the preceding five (5) years or, if in citrus production, ten (10) years of the date of notification required in paragraph 5M-1.010(1)(d), F.A.C.;

(b) Be enrolled in the BMP programs as provided in Chapters 5M-2 through 5M-14, 5M-16 through 5M-19, or 5I-6, F.A.C., on applicable parcels and production activities;

(c) Maintain the land as fallow for more than one year; and

(d) Notify the Department in writing to AgBmpHelp@FDACS.gov or the Florida Department of Agriculture and Consumer Services, Office of Agricultural Water Policy, 407 South Calhoun Street, Tallahassee, FL 32399, and request classification as a Temporarily Inactive Operation within 60 days of ceasing production or 90 days of adoption of this rule. Such notification shall include:

1. Identification of the parcel to be classified as a Temporarily Inactive Operation, including the existing Notice of Intent to Implement BMPs (NOI) numbers, parcel numbers and geographic extent of those areas to be classified as temporarily inactive;

2. Confirmation that the agricultural producer meets the requirements of paragraphs 5M-1.010(1)(a) and 5M-1.010(1)(b), F.A.C.; and

3. Statement that the agricultural producer intends to return to active agricultural production on those parcels subject to temporarily inactive status within a time period not to exceed five (5) years from the date of notification, unless the production areas are verified as still inactive by the Department prior to the expiration of the five-year period.

(2) For Temporarily Inactive Operations, the following BMPs shall be applicable and constitute the basis for verification of the status of implementation:

(a) No fertilizer is applied to the inactive parcel in any form;

(b) Installed or constructed surface water management systems and structures are operated in accordance with a permit issued pursuant to Section 373.4131, F.S. In the absence of such a permit, the system and structures are maintained in working order and operated consistent with the practices below:

1. For ditch systems that contain water control structures, remove boards only when necessary to prevent adverse hydrologic impacts to adjacent parcels; and

2. During the inactive period, fixed weirs or other means of outfall shall be maintained, or repaired if necessary, to achieve the same level of service as when the operation was enrolled or the infrastructure was constructed.

(c) During the inactive period, the primary infrastructure for irrigation or water table management systems shall be maintained at the same condition as when the operation became inactive. Primary infrastructure does not include secondary distribution pumps;

(d) Implement measures to prevent or control woody exotic and invasive vegetative species listed in Rule 5B-57.007, F.A.C.; and

(e) Manage and store chemicals, fuels, and other regulated materials on the property as required by state and federal law.

(3) Producers who have executed, or expect to be under, a contract, easement, or other agreement with the Florida Department of Environmental Protection, a water management district, or the Department to operate a water resource project shall operate in compliance with the terms of such contract, easement, or other agreement. The producer must return to active agricultural production within five (5) years of the expiration or termination of the contract, easement, or other agreement, including any extensions and amendments. If the operations are terminated prior to the expiration due to lack of funding, the time period to return to active agricultural operation shall begin from the last date of operating the system.

(4) Those areas within an existing NOI that are not subject to classification as Temporarily Inactive Operations shall remain subject to the conditions of the existing NOI.

(5) Producers who are temporarily inactive must notify the Department in writing to AgBmpHelp@FDACS.gov or the Florida Department of Agriculture and Consumer Services, Office of Agricultural Water Policy, 407 South Calhoun Street, Tallahassee, FL 32399, and request re-classification or enroll in BMPs specific to their commodity within 60 days of starting production.

Rulemaking Authority 403.067(7)(c)2., 403.067(7)(d)2.c., 570.07(10), 570.07(23) F.S. Law Implemented 403.067(7)(d)2.c. F.S. History—New 5-12-20.