



October 31, 2017

BOTTOMLAND AND SWAMP FORESTS SYMPOSIUM

October 31 - November 2, 2017
Hilton Riverside Hotel - Wilmington, NC

go.ncsu.edu/bottomland-symposium

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Two Federal Court Cases in GA

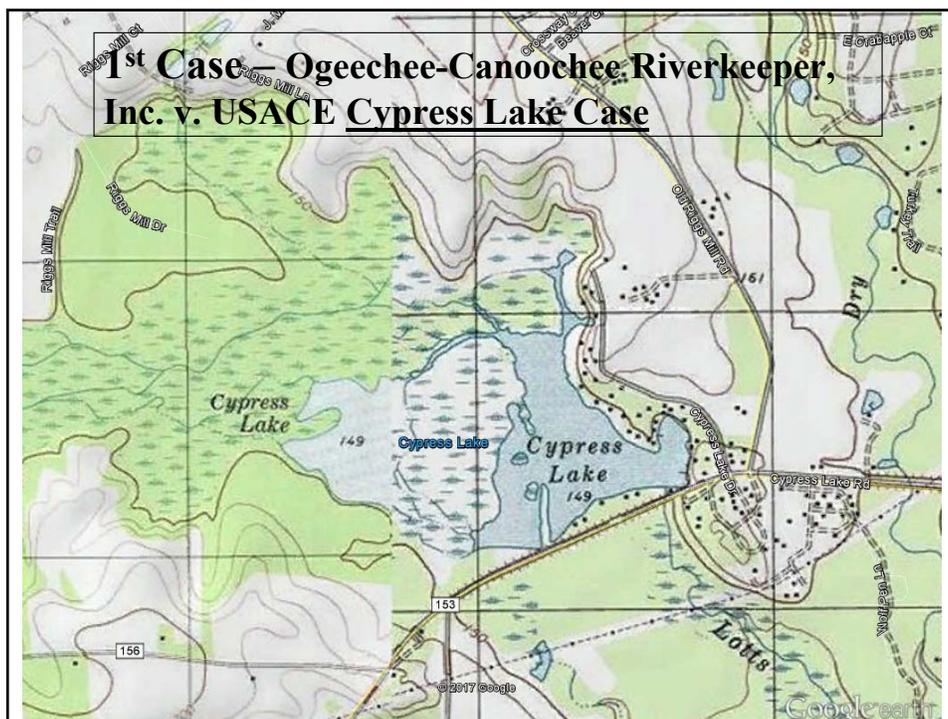
- Ogeechee-Canoochee Riverkeeper, Inc. v. US Army Corps of Engineers – SD GA, 2008 (Cypress Lake Case)
- Ogeechee-Canoochee Riverkeeper, Inc (OCRK) v. TC Logging SD GA, 2009
- OCRK represented by Southern Environmental Law Center, both cases

Short Summary of 404(f)

(Source: 33 CFR 323.4 - Discharges not requiring permits)

- In order to be exempt from wetland (404) permitting, there are narrow exemptions - **normal** farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products.
- The activities must be part of an **established (i.e., on-going)** farming, silviculture, or ranching operation in order to qualify.
- Another part of the exemption is that of dredged or fill material for the construction or maintenance of farm roads or forest roads where such roads are constructed and maintained in accordance with best management practices. 15 Baseline Provisions/BMPs
- “Recapture” occurs when a discharge results in significant alteration of flow/circulation and waters are brought into a new use.





Ogeechee-Canoochee Riverkeeper, Inc. v. US Army Corps of Engineers – SD GA, 2008 (Cypress Lake Case)

- Cypress Lake is a several-hundred acre, man-made lake located in Bulloch County, GA
- Owned by Cypress Lake, Inc (CLI) - homeowners
- CLI sought to harvest timber from 60 acres .
- The Corps made a 404 (f) exemption determination based on CLI's Forest Mgmt. Plan (FMP), claiming that the harvesting would be "normal and ongoing silviculture".
- OCRK brought an Administrative Procedure Act Claim against the Corps' decision of exemption saying it was an arbitrary and capricious application of the "on-going silviculture" exemption from 404 CWA

Background

- Because of this lawsuit, the owners abandon their plan to harvest timber and OCRK dismisses CLI as a defendant.
- However, the OCRK continued prosecution of Corps despite motion to dismiss finding that the scenario will likely happen again.
- OCRK challenged three aspects of the Corps Exemption Determination:
 - That there was past silviculture on the site
 - The trees will regenerate under recommendation of the current FMP
 - That Corps failed to apply CWA “recapture” clause (any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit....)

Past Silviculture

- The Corps/DoJ relied on photos produced by CLI of stumps as evidence of past harvesting to establish that there was past silviculture.
- OCRK countered that presence of stumps does not indicate past, on-going silviculture. OCRK claimed the trees could have been cut for other reasons, i.e. canoe paths, homeowner views, fishing/hunting access
- OCRK maintained that Corps needed to show, along with the cut stumps, some evidence of someone’s past efforts to regenerate/maintain/protect what resulted in current forest.
- EPA & Corps regulation requires, that to qualify as on-going silviculture, there must be efforts to regenerate and re-establish forests.

Future Regeneration



- GFC wrote FMP for the tract with specific recommendations for harvested stump height vs regen sprouting.
- The FMP recommended that trees be cut at least one foot above the normal water level. Corps cited the presence of the plan and Regen recommendations. However, the Corps failed to explain why this might help resprouting.
- GFC initially recommended maintaining lower water levels at dam until regeneration was established above the normal high water.
- This recommendation later deleted from FMP, but Corps didn't discuss why

Court Findings

- "To constitute past silviculture, there must also be evidence of past efforts to regenerate the forest or evidence that the standing forest is a product of someone's past endeavors. ...lack of any evidence of past efforts by anyone to re-establish this forest at Cypress Lake, or any explanation by the Corps showing why this forest is part of an on-going silviculture operation (as opposed to a naturally standing forest from which some trees were cut in the past)."
- "Accordingly, the agency's interpretation in this case that evidence of previous harvesting alone constitutes past silviculture is plainly inconsistent with its regulation, 33 C.F.R. §323 .4(a)(1)(ii)...Simply put, the Corps needs to provide evidence (*e.g.*, an expert opinion or testimony regarding prior management practices) that past *silviculture* (not just previous harvesting) actually did occur at Cypress Lake."

Outcome & Implications

Outcome: Timber never harvested, no permit sought

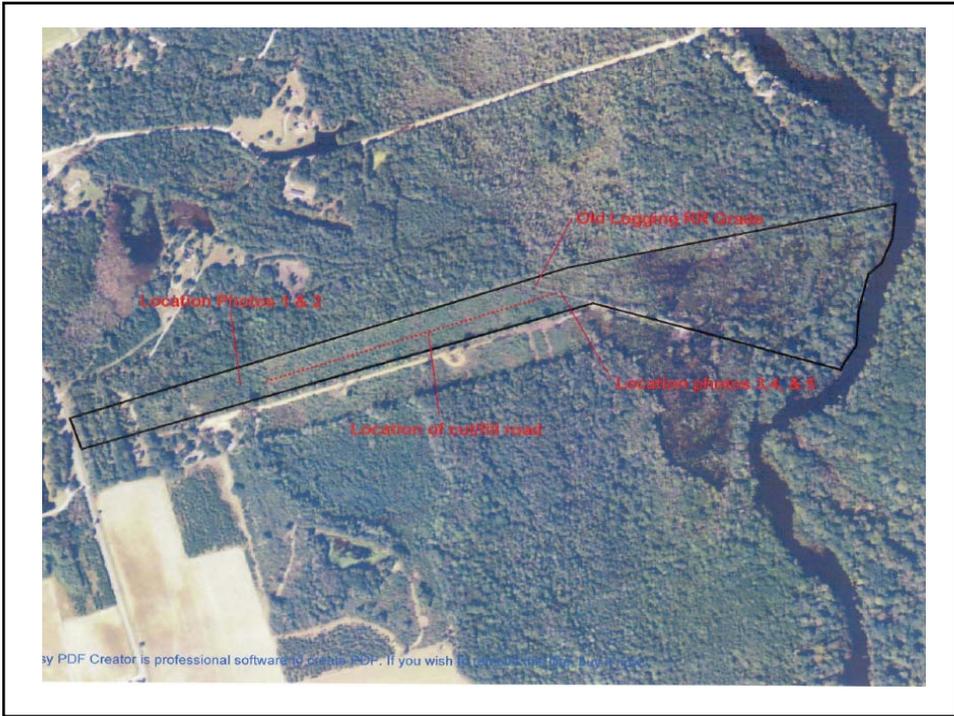
Implications:

- What is “Normal” silviculture?
- Case establishes that a manager must produce evidence that the proposed harvest stand was harvested in past, managed for timber since that harvest, and will be managed for timber in the future.
- Case highlights the need for FMP
- “established (i.e. on-going)” silviculture used in this case to require the regeneration of particular species in order to meet exemption – the case only ever discussed regen of cypress...



Ogeechee-Canoochee Riverkeeper, Inc (OCRK) vs. TC Logging – complaint filed 7/23/08

- Case concerns ~ 38 acre parcel of land that abuts the Ogeechee River in Bulloch County, GA.
- Private Company, T.C. Logging, constructed a road without a permit, through wetlands at the site and claimed forest road exemption.
- OCRK claimed that construction caused repeated and continual discharge of pollutants into the wetlands & that the road and ditches impair/drain wetlands essential to preserving water quality of the Ogeechee River system and the discharge was not exempt from 404 requirements.
- Property was For Sale at time of the case, actually sold prior to judgment. New LO applied for A-T-F Permit in their name, shielded from liability.





UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION
OGEECHEE-CANOCHEE
RIVERKEEPER, INC.,
Plaintiff,

v. 608CV064

T.C. LOGGING, INC., HENRY THOMAS
CLARK, LOW COUNTRY LAND
CLEARING, LLC, LOW COUNTRY LAND
AND EXCAVATING, INC., RSM
ENVIRONMENTAL LAND CLEARING,
INC., and NICHOLAS R. PERKINS,

Logging¹), and subcontractors Low Country
Land Clearing, Inc., Low Country Land and
Excavating, Inc., RSM Environmental Land
Clearing, Inc., and/or Nicholas R. Perkins
(collectively "subcontractors"). The road
was built on property formerly owned by
T.C. Logging on the Ogechee River in
Bulloch County, Georgia (the "Property").
Doc. # 46 at 1-2. OCRK alleges that the
road construction resulted in unlawful
dredging and filling of wetlands in violation
of CWA Sections 301 and 404. OCRK
brings this suit pursuant to 33 U.S.C. § 1365
which allows citizens to sue for CWA
violations after giving notice of the alleged
violation to federal and state authorities and
the violator.

**A. The Clean Water Act
Defendants.**

ORDER

I. INTRODUCTION

In this case, plaintiff Ogechee
Canoochee Riverkeeper ("OCRK") claims
that defendants T.C. Logging, Inc., Henry
Thomas Clark, Low Country Land Clearing,
LLC, Low Country Land and Excavating,
Inc., RSM Environmental Land Clearing,
Inc., and Nicholas R. Perkins violated the
Clean Water Act ("CWA"), 33 U.S.C. §§
1311(a) & 1344, by discharging dredged and
fill material into waters of the United States
without a permit. Doc. # 36. OCRK has
moved for summary judgment on the issue
of liability and standing. Doc. # 46, 56.
Defendants T.C. Logging and Clark have

moved to dismiss the case for lack of subject
matter jurisdiction, claiming that OCRK's
injuries are not redressable by this Court and
that the case has become moot. Doc. # 54.

II. BACKGROUND

The facts of this case center around the
construction of a road by T.C. Logging, its
owner Henry Clark (collectively "T.C.
To put the facts of this case in context,
one must understand certain provisions of
the Clean Water Act. Congress passed the
CWA "to restore and maintain the chemical,
physical, and biological integrity of the
Nation's waters." 33 U.S.C. § 1251(a). To
achieve this goal, Section 301 of the CWA
prohibits "the discharge of any pollutant"
into navigable waters of the United States
without a federal permit. 33 U.S.C. §
1311(a). "Pollutants" include dredged spoil,
rock, and sand, among other materials. 33
U.S.C. § 1362(6). "Navigable waters" can
include wetlands if they have a "significant
nexus" to traditionally navigable waters.
See U.S. v. Robison, 505 F.3d 1208, 1222
(11th Cir. 2007) (construing *Rapanos v.
U.S.*, 547 U.S. 715 (2006)). Anyone who
seeks to discharge dredge or fill material
into navigable waters must obtain a "Section
404" permit from the U.S. Army Corps of
Engineers (the "Corps"). 33 U.S.C. §
1344(d & e). However, there are limited
exceptions. The subcontractors have not appeared in this action
and there is no record of a waiver or return of service
on the docket. As far as the Court can tell, these
parties have not been served.

T.C. Logging does not challenge the Corps'
revised determination that the construction
of the road involved a discharge of dredge or
fill material in violation of the CWA. To
accept the Corps' conclusion, one must
accept the fact that the wetlands in which the
road was built were waters of the United
States.
Thus, there is no dispute that the road was
built in waters of the United States. Nor is
there any question that the discharge
occurred without a CWA permit. Defendant
T.C. Logging has essentially admitted that
OCRK has established a prima facie case
against them. In response to
Plaintiff's Requests for Admissions, T.C.
Logging admits that "fill material was
discharged" into wetlands as part of road
construction activities. *See Ex. A, Resp. to
Req. for Admissions Nos. 20, 21.* More
specifically, T.C. Logging admits that "on or
before September 11, 2007, T.C. Logging
and/or those who performed work[] for T.C.
Logging began placing fill material in
wetlands on the property for the purpose of
constructing a road." *See id.* at No. 6. Thus,
the Court finds that absent an exemption
from CWA's § 404 permitting requirements,
there is no question that defendants T.C.
Logging and its president Henry Thomas
Clark are liable for violating the CWA.³
While T.C. Logging previously claimed
to be exempt from the CWA's permitting
requirements under the Section 404(f)(1)'s
silviculture or forest road exemptions, it
now concedes that neither exemption applies
to the construction of the road. T.C.
Logging bears the burden of proving
entitlement to either of these exemptions.
See U.S. v. Bruce, 41 F.3d 117, 124 (3d Cir.
1994). The silviculture exemption exempts
discharge of fill material for "normal"
silviculture activities "such as plowing,
seeding, cultivating, minor drainage,
harvesting for the production of food, fiber,
and forest products..." 33 U.S.C. §

1344(f)(1)(A). The only activity that
defendants might claim under this
exemption would be the harvesting of
timber. However, roads constructed for
harvesting timber are not covered. 33
C.F.R. § 323.4(a)(1)(iii)(B) ("Harvesting ...
does not include the construction of farm,
forest, or ranch roads.") Thus, T.C.
Logging has not refuted OCRK and the
Corps' position that the silviculture
exemption does not apply to the construction
of the road.
Additionally, T.C. Logging has
abandoned its previous position that the road
construction was subject to the forest road
exemption. The forest road exemption
covers the discharge of dredged or fill
material "for the purpose of construction or
maintenance of farm roads or forest roads ...
where such roads are constructed and
maintained in accordance with best
management practices..." *See* 33 U.S.C. §
1344(f)(1)(E). Permanent roads
constructed
under the forest road exemption must be
done for "forestry activities," *see* 33 C.F.R.
§ 323.4(a)(6)(i), and "intended to be used
solely for such forest functions" as
"planting, fire control, or similar silviculture
support activities." *See* Corps RGL 86-03,
available at
[http://www.saw.usace.army.mil/wetlands/Li
brary/RGL/RGL86-03.pdf](http://www.saw.usace.army.mil/wetlands/Library/RGL/RGL86-03.pdf) (last visited
7/21/09) (noting, as an example, that if a
road through a national forest would
principally serve tourists visiting a
recreational site in the forest, not the actual
business of silviculture, it would not be a
forest road). Furthermore, "the forest or
farm road must be part of an ongoing
silviculture, farming or ranching operation,
which will not bring new areas into use..."
Id.
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of 11 The defendants began construction of

the road before or around the time at which T.C. Logging listed the Property for sale. While the timber had been harvested years earlier, it was regenerating naturally. The Corps concluded that the next harvesting opportunity would not occur for at least 20 to 25 years. Additionally, T.C. Logging's Forest Stewardship Plan stated that the primary objective for the property was to manage a wildlife habitat. The road was described in that document as an "access road on the property" that was "needed because there was no other access to the property besides access from the river." Doc. # 46-16 at 14. All of these facts lead to the conclusion that the road was not built to support an ongoing silviculture operation and it was not intended to be used solely for silviculture support activities.

Finally, the Corps has concluded on reconsideration that "the subject road was not constructed as part of normal, ongoing silviculture operations or for the purpose of construction or maintenance of a forest road, and [it] is therefore not exempt from the requirements of Section 404 of the CWA." Doc. # 46-6 at 8. T.C. Logging's position is that it "ha[s] not disputed the [Corps'] conclusion on reconsideration ... and ha[s] agreed to apply for an 'After the Fact' permit as allowed under the Clean Water Act." Doc. # 46-4 at 6-7. Thus, there is no dispute that T.C. Logging's construction of the road violated the CWA and was not exempted from the CWA's permitting requirements.

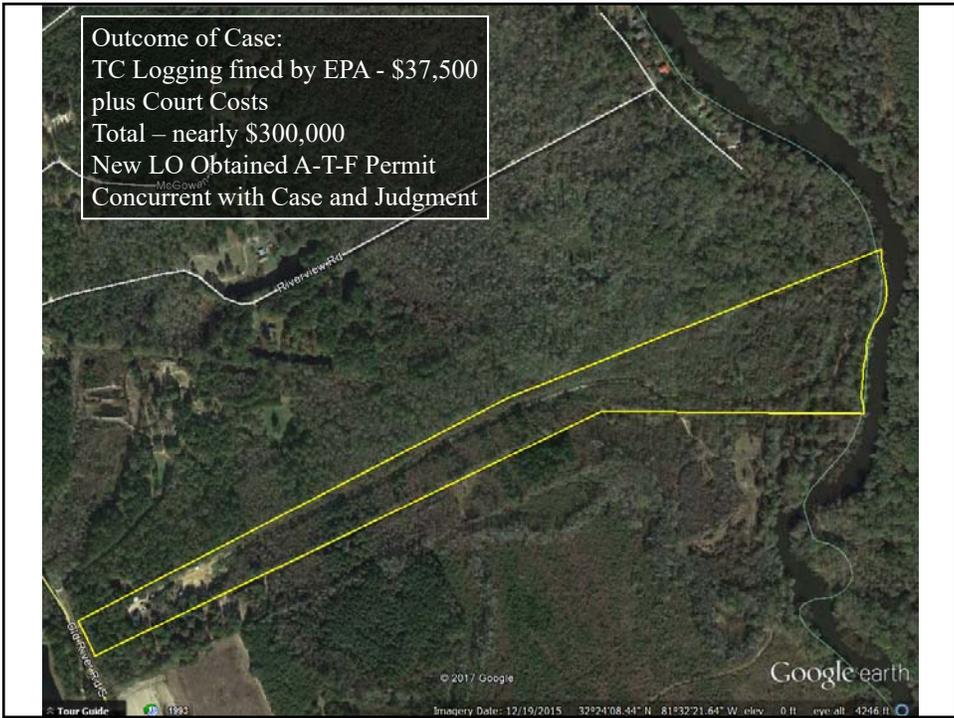
V. CONCLUSION

For the foregoing reasons, the Court concludes that there is no genuine issue of material fact to be tried and that T.C. Logging and Henry Clark have filled wetlands without a permit in violation of Section 404 of the Clean Water Act. The Court **GRANTS** plaintiff OCRK's motions for summary judgment on standing and on liability against defendants T.C. Logging,

Inc. and Henry Clark. Doc. # 46, 54. The Court **DENIES** defendants' motion to dismiss for lack of jurisdiction. Doc. # 56. While this Order disposes of the issue of liability, the Court still must determine the appropriate remedy. On that issue, the Court must conduct a hearing to evaluate the factors set forth in 33 U.S.C. § 1319(d). The Court will await a motion from OCRK for a hearing on this matter.

Finally, OCRK has not filed proof of service with the Court for defendants Low Country Land Clearing, LLC, Low Country Land and Excavating, Inc., RSM Environmental Land Clearing, Inc., and/or Nicholas R. Perkins as required by F.R.Civ.P. 4(l). Within 14 days, OCRK shall provide proof of service or the Court will dismiss the action without prejudice against those defendants. See F.R.Civ.P. 4(m).

This 4th day of August 2009.



Lessons Learned from 2 Bulloch County Court Cases About the 404 Exemption

What constitutes normal, established (i.e. on-going) silvicultural activities

- Normal activities include “plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products”.
- Established = past – there should be evidence of past management activities – not only harvests, but efforts by someone toward regeneration, management, protection
- On-going = future – Management Plans giving details for regeneration, management, protection, and harvests – the stated primary purpose for ownership must be timber management for harvest of forest products



Lessons Learned from 2 Bulloch County Court Cases About the 404 Exemption

What constitutes a normal, BMP compliant silvicultural, therefore exempt forest road?

- The road must access a forest stand that is being managed
- The road must comply with the 15 baseline provisions
- The road can only access loading decks.....Road sections that go on down to the riverbank fishing hole (or recreational pond?) require permits
- The road can only be as wide as necessary to accommodate forestry management, harvesting, hauling, and fire control equipment

Disclaimer

“The Federal Clean Water Act, Section 404 (40 CFR Part 232.3), exempts normal established, ongoing silvicultural activities from the permitting process for discharges of dredged or fill material in wetlands, streams and/or other jurisdictional waters of the US. However, fifteen (15) baseline provisions for forest road construction and maintenance in and across waters of the U.S. (lakes, rivers, perennial and intermittent streams, wetlands, sloughs and natural ponds) are mandated to qualify for the forest road exemption. The burden of maintaining silvicultural exemptions through historical activity, current activities and future plans falls on the landowner. The ultimate determination of whether activities are exempt can only be made by the USACE or the USEPA”

GEORGIA'S Best Management Practices for Forestry

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