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THE FLORIDA LEGISLATURE
**JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE**

May 8, 2013

Mr. Andrew Ross
Sr. Specialist Attorney
South Florida Water Management District
P.O. Box 24680
West Palm Beach, FL 33416-4680

Re: Proposed Amendments to Rule Chapter 40E-6, F.A.C., FAR ID No. 12864739

Dear Mr. Ross:

I have completed my initial review of the above-referenced rule package, which was advertised in the Florida Administrative Register on April 10, 2013. The following comments are for your consideration and response.

40E-6.011(6) The "Criteria Manual for Use or Occupancy of the Works or Lands of the District" (Criteria Manual), currently incorporated in rule 40E-6.091(1), should be incorporated in this rule, which includes the manual as part of the actual meaning of the rule. The procedure for incorporation of materials by reference is found at rule 1-1.013, F.A.C.

In addition, the title of the document provided to this Committee is "SFWMD Right of Way Permit Information Manual, Criteria Manual for Use of Works of the District, March, 2013," not "Criteria Manual for Use or Occupancy of the Works or Lands of the District." The difference between the two titles should be reconciled.

40E-6.051(1) This rule references "the document listed in subsection 40E-6.091(1), F.A.C." That document has been labeled in rule 40E-6.091(1), as "Criteria Manual."

40E-6.051(1)(c) This rule lists low lying groundcover as exempt from permitting "in certain zones." Because the Native Groundcovers chart in the Criteria Manual lists planting zones for groundcover, and rules 40E-6.701 - .751, address revegetation in the C-18 canal right-of-way use zones, the

reference to “certain zones” is ambiguous and should be rewritten to be more specific.

40E-6.051(1)(e) This rule includes “not-for-profit” activities among those activities which are exempt from permitting. Because the revenue structure of an activity is not necessarily related to damage to the works and lands of the District from that activity, please provide the rational basis for exempting not-for-profit activities from having to obtain a permit.

40E-6.091(1) As indicated in my comment to rule 40E-6.011(6), above, this rule incorporates the “Criteria Manual for Use or Occupancy of the Works or Lands of the District” (Criteria Manual), as part of a list of incorporated materials. Because s. 120.55(1)(a)4., F.S., states, in part, that “any form or instruction which meets the definition of ‘rule’ provided in s. 120.52 shall be incorporated by reference into the *appropriate* rule,” the Committee recommends that materials should be incorporated into the rule which references those materials to add to the meaning of the rule. Again, the procedure for incorporation of materials by reference is found at rule 1-1.013, F.A.C.

In addition, the title of the document provided to this Committee is, “SFWMMD Right of Way Permit Information Manual, Criteria Manual for Use of Works of the District, March, 2013,” not “Criteria Manual for Use or Occupancy of the Works or Lands of the District.” The difference between the two titles should be reconciled.

40E-6.221(8) This rule states that where the District does not own the fee simple title, that applicants “may” be required to show necessary legal interests from the owner. Use of the word “may” necessarily implies that the district either may or may not choose to require the applicant to show legal interests based upon whim or caprice. This constitutes an arrogation of unbridled discretion to the district. See, *Barrow v. Holland*, 125 So.2d 749 (Fla.1960). Section 120.52(8)(d), F.S., defines invalid exercise of delegated legislative authority as the vesting of unbridled discretion in an agency by rule.

40E-6.221(9) See my comment above to rule 40E-6.221(8) as it relates to the statements that commercial use of fee-owned rights of way “may” be authorized by a lease and/or agreement with the District, and that commercial use of the District’s nonfee-owned rights of way “may” be allowed under certain conditions.

40E-6.321(1) See my comment above to rule 40E-6.221(8) as it relates to the statement that certain authorizations “may” be transferred to a new property owner under certain conditions.

- 40E-6.331(3)** See my comment above to rule 40E-6.221(8) as it relates to the statement that letter modifications “may” be issued by District staff provided certain conditions are met.
- 40E-6.331(4)** This rule states that the District “is authorized” to modify a permit under certain conditions. Unless the District is simply informing the readers that it has authority to take this action, stating that the District “is authorized” has the same meaning as a statement that the District “may” take certain action. See my comment above to rule 40E-6.221(8) as it relates to the statement that the District “is authorized” to take the action described.
- 40E-6.341(1)** See my comment above to rule 40E-6.331(4) as it relates to the statement that the District “is authorized” to revoke a right of way occupancy permit under the listed circumstances.
- 40E-6.341(2)** This rule states that Right of Way Occupancy Permits “are subject to” immediate revocation under certain circumstances. Stating that permits “are subject to” revocation by the District has the same meaning as a statement that the District “may” revoke the permits. See my comment above to rule 40E-6.221(8) as it relates to the statement that the permits “are subject to” revocation by the District in this rule.
- 40E-6.361(1)** This rule requires applicants seeking a right of way occupancy permit to provide and maintain financial assurances to the District and its successors to ensure full compliance with terms of the permit. Please provide and explain the specific law being implemented by this rule.
- 40E-6.481(3)** See my comment above to rule 40E-6.221(8) as it relates to the statement that the District “may” repair, alter or remove a permitted use at the Permittee’s expense if the Permittee fails to repair, alter or remove that use when ordered to do so by the District.
- 40E-6.501(7)** This rule prohibits planting of vegetation not included on the District’s “designated plant list.” Because this rule cannot be understood without access to this list, the District’s designated plan list is incorporated by reference. Rule 1-1.013, F.A.C., of the Department of State, specifying the procedures by which materials may be incorporated by reference, must be followed to incorporate this list. If, however, this list is incorporated elsewhere, a reference to that incorporation must be included in this rule.
- 40E-6.601(3)** Because the fees and categories referenced in this rule are more fully explained in the Criteria Manual, that manual and the rule in which it is

incorporated should be referenced in this rule for the convenience of the reader.

- 40E-6.701** A rule should not include a subsection (1) without a subsection (2).
- 40E-6.721(6)** See my comment above to rule 40E-6.221(8) as it relates to the statement that an occupancy permit “may” be revoked under certain conditions.
- 40E-6.741(1)** See my comment above to rule 40E-6.221(8) as it relates to the statement that the District “may” pursue corrective actions, and to the statement that District forces “may” perform restorative work under certain circumstances.
- 40E-6.741(2)** See my comment above to rule 40E-6.221(8) as it relates to the statement that the District “may” install access control fences under certain circumstances.
- 40E-6.751(11)(d)5.** This rule, requiring photographs of “the tree” to be included with permit applications, is impermissibly vague, as the rule forces the reader to guess at the identity of the tree to be photographed.

These comments have been provided for your consideration and response. Final notice of any substantive change must be noticed in the FAR and filed with this Committee no later than 21 days prior to the date these rules are filed for adoption. Notices of technical change or no change must be submitted to this Committee no later than 7 days prior to adoption. Therefore, if you could provide me with a response within two to three weeks of the date of this letter in the form of corrections, explanations, or additional authority it will help us to meet these deadlines.

Sincerely,



Suzanne G. Printy
Chief Attorney