



SOUTH FLORIDA WATER MANAGEMENT DISTRICT

May 20, 2013

Suzanne G. Printy, Chief Attorney
Joint Administrative Procedures Committee
Room 680, Pepper building
111 W. Madison Street
Tallahassee, FL 32399-1400

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2013 MAY 20 PM 2:14
JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE

Subject: Proposed Amendments to Rule Chapter 40E-6, F.A.C.

Dear Ms. Printy:

Thank you for reviewing our rules and providing your comments. This is in response to your May 8, 2013 commenting on the District's proposed rule amendments.

The District's rights of way, which are the subject of these rules, includes the Central and Southern Florida Flood Control Project, a federal project entrusted to the District for operation and maintenance pursuant to Chapter 33 U.S.C. 408. As the local sponsor, the District is required to retain full control and dominion over the rights of way to comply with federal requirements and ensure existing and future facilities are constructed consistent with approved US Army Corps of Engineers (USACE) and District technical criteria. Federal regulations require structures and facilities constructed by the United States for local flood protection to be continuously maintained in such a manner and operated as necessary to obtain the maximum benefits (33 C.F.R. §208.10; Sec. 3, 49 Stat. 1571, as amended; 33 U.S.C. 701c).

The obligations of the Central and Southern Florida Flood Control District were assumed by the District when the Florida Legislature enacted the Florida Water Resources Act of 1972, Ch. 72-299, Laws of Fla., codified in Chapter 373, F.S. (§§ 373.149 and 373.1501(4), F.S.) Florida Statutes 373.085 and 373.086 provide the District with the necessary authority to regulate its rights of way. Chapter 40E-6, F.A.C., outlines the regulatory requirements that must be met prior to connecting to or making use of the District's rights of way.

Since the District holds the real property interests in the subject rights of way that the applicants are seeking to connect to, or make use of, this a proprietary based program, and not a program regulating assets held by the public as a whole, such as natural resources (i.e. water, wildlife, air, etc.). As a property owner, the District can control its property as any other property owner can, and Chapter 120, F.S., is not applicable.

However, Chapter 373, F.S., specifically authorizes the District to issue or cancel permits for use of its property. Chapter 373.085(1), F.S., provides in part that “[t]he governing board **has authority** [emphasis added] to prescribe the manner in which local works provided by other districts or by private persons will connect with and make use of the works or land of the district, to issue permits therefor, **and to cancel the permits for noncompliance with the conditions thereof or for other cause** [emphasis added].” Section 373.086(1), F.S., provides in part that the governing board of the District “...**is authorized** [emphasis added] ...to hold and have full control over the works and rights of way of the district.” These statutes recognize the District’s complete and total dominion and control over its rights of way in order to address all potential circumstances, and the District is under no obligation to allow any use thereof, since the District is responsible for operating and maintaining its canal rights of way for flood control purposes in the best interest of the health, safety and general welfare of the public.

The following are specific responses to your comments (your comments in italics):

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 “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.

The reference to the “Criteria Manual” will be reconciled to “Right of Way Criteria Manual for Use of the Works or Lands of the District” (Criteria Manual), both in the rule and the manual itself, and incorporated in this rule in accordance Rule 1-1.013, F.A.C.

40E-6.041(3)(ii)

A correction is being made to the 40E-6.221 rule reference from subsection (8) to subsection (9).

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.”*

The reference to "the document listed in subsection 40E-6.091(1), F.A.C." will be modified to "the Criteria Manual, incorporated by reference in subsection 40E-6.091(1), F.A.C."

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.*

Pursuant to your comment, "in certain zones" will be removed.

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.*

The basis for exempting not-for-profit activities from having to obtain a permit is because commercial activities on District rights of way compromises the District's immunity from liability established under the recreational immunity statute, §373.1395, F.S. With that being said, subsection (e) will be deleted.

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, "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.

As indicated in response to rule 40E-6.011(6), above, the title to the Criteria Manual has been reconciled to be "Right of Way Criteria Manual for Use of the Works or Lands of

the District” and will be incorporated in accordance with the procedure set forth in Rule 1-1.013, F.A.C.

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.*

This section will be revised to state “In those instances where the District does not own the underlying fee simple title, it shall be the responsibility of the applicants ~~may be required to obtain approval~~ show the necessary legal interest from the owner of the underlying fee...”

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 non fee-owned rights of way “may” be allowed under certain conditions.*

These rules only apply to issuing right of way occupancy permits with respect to District right of way. Right of way occupancy permits are issued for a one time administrative fee. It would not be appropriate for such commercial uses to be made of fee owned government land for just a one-time administrative fee. Such uses of fee owned government land must be subject to the payment of fair rent, which is not the subject to the right of way permitting rules. The intent here is to advise the applicant that they have the option to pursue their proposed use under the leasing or real estate policies, which does provide for the payment of rent.

To that end, this section will be revised to clarify that issue as follows:

Except for utilities, no commercial uses on the District’s fee-owned right of way will be authorized by a Right of Way Occupancy Permit ~~but may be authorized by a lease and/or agreement with the District.~~ However, applicants may apply for such use in accordance with the District’s real estate or leasing policies. Commercial use of the district’s non-fee-owned rights of way by the underlying fee-owner shall be allowed authorized under a right of way occupancy permit, provided such authorizations take ~~into consideration~~ are determined to be in accordance with those determining factors set forth in Rule 40E-6.221(3), F.A.C.

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.*

This rule will be revised to state "... However, upon request, these authorization shall may be transferred..."

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.*

This rule will be revised so that the "may" shall be changed to "shall".

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.*

As a holder of a land interest, the District is simply informing the readers that it has authority to take this action. See our background information stated above that authorizes the District to full control and dominion over the right of way.

Additionally, Rules 40E-6.331(4) and 6.341, F.A.C., concern the District's authority to take enforcement action through modifications or revocations to protect its property interests and enforce right of way permit conditions. The use of "may" or "is authorized" in these instances is appropriate and consistent with the legislative direction contained in sections 373.119(1), 373.129 and 373.136, F.S., which use the terms "may" and "is authorized". The language in these rules track this legislative direction. Notwithstanding this broad discretion granted, the District enumerated specific instances in which enforcement through revocations or modifications may be taken. Use of the word "shall" is not appropriate because it fails to recognize that it is impossible to contemplate every conceivable situation that could require a revocation. In addition, the parties may decide on an alternative course of action, or the violation may not be material at the time.

The case you refer to regarding the use of "may", Barrow v. Holland, 125 So.2d 749 (Fla. 1960), is distinguishable since it concerns a situation unrelated to enforcement or revocation. Holland involves unbridled discretion in connection with the initial issuance of permits. In Holland, there was no criteria for issuance of permits, as it was in the complete discretion of agency employees. Chapter 40E-6, F.A.C., has specific criteria for issuing permits, and even enumerates specific instances in which enforcement through revocations or modifications may be taken. In support of this, I refer you to

Morey's Lounge, Inc. v. Florida, et al., 673 So.2d 538 (Fla. 4th DCA, 1996) which provides that in connection with enforcement, discretion is necessary, particularly when the use is a privilege as opposed to a right, the exercise of which could potentially be injurious to the public welfare. In this situation, the permitted use involves use of District real estate interests, and improper use has significant potential to be injurious to the public welfare since it could result in catastrophic flooding. I also refer you to Trianon Park Condo Assoc, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985), which provides that regulatory officials have discretionary power to enforce compliance (see Trianon at pgs 919 - 920).

Additionally, use of the terms "may" or "is authorized" in the context of enforcement and revocation is consistent with other similar water management district rules. See Rules 40A-6.331, 40A-1.205, 40B-4.1110, 40B-4.1120(1), 40D-4.341, 40E-40.341, 40E-4.341(1), and 40E-2.341, F.A.C.

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.*

See my comment above to rule 40E-6.331(4) as it relates to the discretion necessary for enforcement through revocations.

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.*

See my comment above to rule 40E-6.331(4) as it relates to the discretion necessary for enforcement through revocations.

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.*

I refer you to the introduction and the District's statutory authority, discussed above, to hold and have full control over the works and right of way of the district. In order to ensure that certain permitted facilities will be removed, at no cost to the public, if abandoned, neglected, or no longer consistent with the operations and maintenance needs of the District and require removal and restoration of the District's works or lands, financial assurances are required in order for the District to maintain full control over the works and right of way of the District.

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.*

This rule will be revised by replacing "may" with "is authorized". Again, as stated above, as a holder of a land interest, the District is simply informing the readers that it has authority to take this action and has such discretionary power to enforce compliance.

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 plant 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.*

This rule will be revised to direct reader's the plant list contained in the Criteria Manual with the insertion of "contained in the Criteria Manual, incorporated by reference in Rule 40E-6.091, F.A.C.," following "plant list".

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.*

This rule will be revised to direct reader's to the fees and categories more fully explained in the Criteria Manual with the insertion of "more specifically described in the Criteria Manual, incorporated by reference in Rule 40E-6.091, F.A.C.," following "Chapter 40E-6, F.A.C."

40E-6.701 *A rule should not include a subsection (1) without a subsection (2).*

This rule will be revised to delete the subsection reference "(1)".

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.*

See my comment above to rule 40E-6.331(4) as it relates to the discretion necessary for enforcement through revocations.

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.

See my comment above to rule 40E-6.331(4) as it relates to the discretion necessary for enforcement through revocations and the statutory authority, discussed above, to hold and have full control over the works and right of way of the district.

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.*

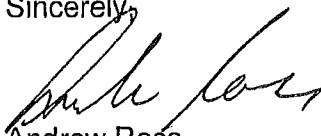
See my comment above regarding the statutory authority of the District to hold and have full control over the works and right of way of the district with complete and total dominion.

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.*

This rule will be revised to state "...photographs of the tree to be pruned", prior to work being accomplished, pursuant to subparagraph (4), above."

I believe these corrections, revisions, and explanations should address all of your comments. The District's Governing Board adoption hearing is scheduled for June 13, 2013. Please contact me at (561) 682-6755, email: aross@sfwmd.gov, or my paralegal, Juli Russell (561) 682-6268, email: jurussel@sfwmd.gov, should there be any additional areas needed to be addressed.

Sincerely,



Andrew Ross
Sr. Specialist Attorney

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