



# SOUTH FLORIDA WATER MANAGEMENT DISTRICT

June 5, 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 JUN -5 PM 1:09  
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. We appreciate your time and effort in connection with this matter. In follow up to our telephone conversation last Friday, I am providing to you the following information to distinguish the District's Right of Way Occupancy Permit Program, contained in Chapter 40E-6, F.A.C., which is a proprietary based program, from other regulatory programs which you review.

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.). The District can control its property interests as any other property owner can, and Chapter 120, F.S., is not applicable.

Chapter 373, F.S., however, 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." This is consistent with general real property law concerning licenses/rights of entry which by their very nature are revocable.

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. These statutes further give the District

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. 4<sup>th</sup> 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.

With respect to financial assurance, 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. This is consistent with the District's authority to prescribe the manner in which parties connect to, or make use of the works or lands of the District. The statute does not specifically list financial assurances, but the statute does not list any other specific powers, it just grants the District the power to prescribe the manner in which parties connect to and make use of works or lands of the District and retain complete dominion and control thereof. This is consistent with any proprietary based program.

Furthermore, the permittee specifically acknowledges the permit revocations and financial assurance forfeiture with regards to permitted use of the District's rights of way. The application, contained in the Criteria Manual and signed by the permittee, includes the following language:

In signing this application, I acknowledge that failure to comply with all conditions of this permit may result in permit revocation, financial assurance or bond forfeiture, and remedial action against me by the SFWMD. I assume full responsibility for the actions of all of my employees, agents and persons, whether under direct contractual obligation to me or indirectly, with respect to compliance with the conditions and limitations contained within this application or within a permit issued as a result of this application.