



Florida Department of Environmental Protection

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March 9, 2018

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

REC'D
2018 MAR -5 AM 9:30
PROCL. REC'D. BY MAIL
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Re: Proposed Amendments to Chapter 62-330, F.A.C.

Dear Ms. Printy:

Thank you for your March 7, 2018, correspondence, in which you provided comments on the Department's rulemaking in Chapter 62-330, Florida Administrative Code (F.A.C.). The Department offers the following comments in response. For convenience, we have reproduced your comments in *italics*, followed by our response.

62-330.010(4)(a) *This rule incorporates Applicant's Handbook Volume I, "General and Environmental" (June 1, 2018). The following comments relate to that handbook:*
Part I, 1.0
The introduction to the Applicant's Handbook Volume I (AH,I) includes a reference to the Operating and Delegation Agreements which are incorporated by reference in Chapter 62-113, F.A.C. That reference includes a web address which appears to be hyperlinked to the referenced material. Subparagraph 120.55(1)(a)4., F.S., states, in part, "The department may not allow hyperlinks from rules in the Florida Administrative Code to any material other than that filed with and maintained by the department." Because the AH,I is incorporated into Rule 62-330.010, F.A.C., it is part of the rule, and materials such as the agreements referenced here may not be hyperlinked from this handbook. The comment above applies to the materials which appear to be hyperlinked from the AH,I in the following sections: 1.2, 1.3.1.2, 1.3.2.1, 1.3.2.2, 1.3.4, 1.4.2, 3.1.2, 4.2.3, 10.2.6, 10.2.7, and 11.4.

In response to your comment, we have removed all hyperlinks from internet addresses in Volume I.

1.3.1.2 State Programmatic General Permit (SPGP) and Programmatic General Permits (PGPs)

The referenced procedures and scope of the SPGP appear to meet the definition of a rule and should be incorporated by reference. If these materials have been incorporated elsewhere, that rule should be referenced. If not, the materials should be incorporated in Rule 62-330.010, F.A.C.

The State Programmatic General Permit (SPGP) is a permit issued to the Agencies by the U.S. Army Corps of Engineers (Corps) that allows us to issue certain federal authorizations on the Corps' behalf. The SPGP is a federal permit, and not a state authorization. The permit may be modified by the Corps or the Agencies at any time and must be re-issued every 5 years. This section of the handbook merely provides information about the SPGP. The SPGP should not be incorporated into rule because it is a permit, not a rule, and is subject to change, modification, or revocation at any time.

1.3.2.1 NPDES Stormwater Construction

Similarly, the information on the Construction Generic Permit referenced in this section as located at <https://floridadep.gov/Water/Stormwater> appear to meet the definition of a rule, and should be incorporated by reference in this rule; or if these materials have been incorporated elsewhere, that rule should be referenced here.

This section of the handbook is merely informational for applicants. The Construction Generic Permit is not an ERP permit under Chapter 62-330, F.A.C., but many projects authorized under Chapter 62-330, F.A.C., also require a separate NPDES Generic Permit from the NPDES program.

1.3.2.2 NPDES Dewatering

Again, the information on the Dewatering Permit referenced in this section as located at <https://floridadep.gov/water/industrial-wastewater> appear to meet the definition of a rule, and should be incorporated by reference in this rule; or if these materials have been incorporated elsewhere, that rule should be referenced here.

This section of the handbook is merely informational for applicants. The Dewatering Permit is not an ERP permit under Chapter 62-330, F.A.C., but some projects authorized under Chapter 62-330, F.A.C., also require a separate NPDES Dewatering permit from the NPDES program.

1.4.2 Rules

The reference to Rule Chapter 40D-4, in the third full paragraph on page 1-16 should be changed to 40D-6.

As indicated by the last sentence of this paragraph, most of Chapter 40D-4 remains applicable for grandfathered activities permitted prior to October 1, 2013. Chapter 40D-6 currently contains no rules.

3.1.2

“Grandfathered Activities”

The provisions referenced as included in the “References and Design Aids” for Volume I appear to meet the definition of a rule, and should be incorporated by reference in Rule 62-330.010, F.A.C.

The provisions referenced in 3.1.2(a) are copies of the 2012 version of section 373.414, Florida Statutes. The statutory provisions are reproduced within the References and Design Aids; however, those aids do not implement or interpret the statutory provisions, the aids only provide the statutory language for convenience.

4.2.3

Preparing and Application for an Individual or Conceptual Approval Permit

(h) The requirements in Rule 18-21.004(3)(b), F.A.C., and the exception in Rule 18-21.004(1)(d), F.A.C., appear to meet the definition of a rule, and should be incorporated by reference in Rule 62-330.010, F.A.C.

In accordance with Rule 62-330.075, F.A.C., section 4.2.3 advises that applicants requesting an ERP permit on state-owned submerged lands must also receive a sovereign submerged lands authorization. However, that authorization is a separate and distinct authorization issued pursuant to Chapters 253 or 258, Florida Statutes, and Chapter 18-21, F.A.C. It is not incorporated into the ERP permit, nor does Applicant’s Handbook I implement or interpret Chapters 253 or 258, Florida Statutes, or Chapter 18-21, F.A.C. *See also*, Applicant’s Handbook I, § 5.6.

7.3

Informal Determinations

(b) This rule states that rule 62-330.071, F.A.C., requires payment of a fee for a request for an informal determination by the Agency. Exactly where are the fee requirement and fee amount located?

Section 7.3 directs the applicant to Rule 62-330.071, F.A.C., which provides that the fee schedules are located in the following rules, copies of which were provided to you on March 2, 2018:

- Department or Northwest Florida Water Management District – Rule 62-4.050, F.A.C.
- Suwannee River Water Management District – Rule 40B-1.706, F.A.C., (October 1, 2013) [October 1, 2013], (<https://www.flrules.org/Gateway/reference.asp?No=Ref-02534>);
- St. Johns River Water Management District – Rule 40C-1.603, F.A.C., (October 1, 2013) [October 1, 2013], (<https://www.flrules.org/Gateway/reference.asp?No=Ref-02535>);
- Southwest Florida Water Management District – Rule 40D-1.607, F.A.C., (October 1, 2013) [October 1, 2013], (<https://www.flrules.org/Gateway/reference.asp?No=Ref-02536>); and
- South Florida Water Management District Rule – Rule 40E-1.607, F.A.C., (October 1, 2013) [October 1, 2013], (<https://www.flrules.org/Gateway/reference.asp?No=Ref-02537>).

10.2.6**Vertical Seawalls**

(a)5. The link to the National Marine Fisheries Service as Critical Habitat for the smalltooth sawfish provided in this paragraph no longer appears to be correct.

The link <http://www.nmfs.noaa.gov/pr/pdfs/criticalhabitat/smalltoothsawfish.pdf> has been replaced by <http://www.nmfs.noaa.gov/pr/species/fish/smalltooth-sawfish.html>. Also, as mentioned in the first response, the hyperlink has been removed.

12.3.4

Homeowners' associations, property owners' associations, and condominium owners' or master associations (Associations)

This rule requires the Associations listed above to have, and be able to prove, in the manner listed, the financial, legal, and administrative capability to provide for long term operation and maintenance of a project. Please provide and explain the specific law implemented authorizing these requirements.

The law implemented is section 373.416(1), Florida Statutes, which states:

Except for the exemptions set forth in this part, the governing board or department may require such permits and impose such reasonable conditions as are necessary to assure that the operation or maintenance of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto, will not be inconsistent with the overall objectives of the district, and will not be harmful to the water resources of the district.

The Agencies need assurance that the entity will have financial, legal, and administrative capability as described in this section to operate and maintain a project so that it meets the requirements of this section. Without this assurance, we cannot determine if the activity will remain in an operable condition. If the system becomes inoperable, it could become out of compliance with the requirements of this part. *See also*, Fla. Admin. Code R. 62-330.301(1)(j).

Appendix I**b. Water Elevations**

This rule states that the Department "may" require the permittee to take certain measures to provide reasonable assurance that adverse effects to surface waters will not occur as a result of dewatering or subsurface excavation. Use of the word "may" necessarily implies that the Department either may or may not choose to require those measures be taken based upon whim or caprice. This constitutes an arrogation of unbridled discretion to the Department. 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.

In response to your comment, we have changed the language as follows:

To provide this assurance, the Department ~~may~~ shall require the permittee to take certain measures, as necessary, such as installing piezometers and staff gauges, and monitoring them on a permitted interval. To the extent that an existing water use permit or consumptive use permit addresses the foregoing, such permit may provide reasonable assurance that the stormwater management system will meet these objectives.

d. Water and Soil Quality

This rule also states that certain measures, in this case representative soil characterization, "may" be required by the Department under certain conditions. Again, use of the word "may" necessarily implies that the Department either may or may not choose to require those measures be taken based upon whim or caprice. This constitutes an arrogation of unbridled discretion to the Department.

In response to your comment, we have changed the language as follows:

An alternative sampling interval will be considered, based on available lithologic data and mine depths, when requested by the applicant. Compliance water quality monitoring ~~shall~~ may be required, as necessary, on a permitted interval to provide reasonable assurance based on the site-specific conditions and the proposed activities.

Representative soil characterization ~~shall~~ may be required, as necessary, for areas of the property that may be contaminated with potentially-hazardous substances.

62-330.010(4)(b)2. *This rule states that it incorporates Suwannee River Water Management District, Applicant's Handbook Volume II (October 1, 2013). The document submitted to this Committee on March 2, 2018, pursuant to s. 120.54(3)(a)4., F.S., was undated. To ensure that the material incorporated by reference is the same as it was on the date it was adopted, as required by s. 120.54(1)(i)1., F.S., the incorporated material should be dated.*
In addition, the reference to Rule 40B-400.091(3), F.A.C., as an alternative rule in which this Applicant's Handbook Volume II is incorporated is incorrect. The reference should be 40B-400.091(2), F.A.C.

The Department does not have ownership of the SRWMD Volume II Handbook and can therefore not amend the Handbook to include a date. The materials provided to you on March 2, 2018, were printed from the reference page for Chapter 62-330 on flrules.org. It does appear, however, that the Department of State gave this Handbook an effective date of August 30, 2013, as indicated at <https://www.flrules.org/gateway/reference.aspx?No=Ref-03182>. Therefore, we will amend the effective date in the rule provision accordingly.

The reference to Rule 40B-400.091(3), F.A.C., has been changed to Rule 40B-400.091(2), F.A.C., in response to your comment.

2016 RE-03182
SUWANNEE RIVER
WATER MANAGEMENT DISTRICT
120.54(1)(i)1
8/30/2013

62-330.010(4)(b)3. *This rule states that it incorporates St. Johns River Water Management District, Applicant's Handbook Volume II (June 1, 2018). The document submitted to this Committee on March 2, 2018, pursuant to s. 120.54(3)(a)4., F.S., was dated October 1, 2013. As s. 120.54(3)(a)4., F.S., requires a copy of any material being incorporated by reference in the proposed rules to be filed with the Committee, if the Department intends to incorporate the Applicant's Handbook Volume II dated June 1, 2018, that must also be the date of the material filed with the Committee.*

We apologize for the confusion. St. John's River Water Management District's Handbook II is finished with rulemaking and will become effective on the same date as Chapter 62-330 – June 1, 2018. We will provide a copy of SJRWMD's filing of its Handbook II and all incorporated materials with our Notice of Change.

62-330.010(4)(b)4. *This rule states that it incorporates Southwest Florida Water Management District, Applicant's Handbook Volume II (June 1, 2018). The document submitted to this Committee on March 2, 2018, pursuant to s. 120.54(3)(a)4., F.S., was dated October 1, 2013. As s. 120.54(3)(a)4., F.S., requires a copy of any material being incorporated by reference in the proposed rules to be filed with the Committee, if the Department intends to incorporate the Applicant's Handbook Volume II dated June 1, 2018, that must also be the date of the material filed with the Committee.*

As discussed during our telephone conversation on March 2, 2018, the Department is incorporating the October 1, 2013, Handbook at this time and will amend this provision accordingly.

62-330.010(4)(b)5. *This rule states that it incorporates South Florida Water Management District, Applicant's Handbook Volume II (June 1, 2018). The document submitted to this Committee on March 2, 2018, pursuant to s. 120.54(3)(a)4., F.S., was dated October 1, 2013. As s. 120.54(3)(a)4., F.S., requires a copy of any material being incorporated by reference in the proposed rules to be filed with the Committee, if the Department intends to incorporate the Applicant's Handbook Volume II dated June 1, 2018, that must also be the date of the material filed with the Committee. In addition, this rule states that South Florida Water Management District Applicant's Handbook Volume II, is also incorporated in Rule 40E-4.091(1)(a), F.A.C. (May 22, 2016). A review of that rule reveals that another document, South Florida Water Management District Applicant's Handbook Volume II, effective May 22, 2016, is incorporated in 40E-4.091(1)(a), F.A.C. For that reason, the statement indicating that the same document, South Florida Water Management District Applicant's Handbook Volume II, is at least misleading, and should be corrected.*

It is the Department's intent to incorporate only the October 1, 2013, Handbook at this time and will revert this provision back to the existing rule language.

62-330.050(2)(f) *This rule requires the property owner to sign authorization to allow the Agency to inspect the location of the proposed activities. The Request for Verification of an Exemption, Form 62-330.050(1) (June 1, 2018), incorporated in this rule, authorizes the owner's representative to "grant permission for staff of the Agency to access, inspect, and sample the lands and water of the property as necessary for the review of the proposed activities specified in [the] form." Please provide and explain the law implemented for this rule to require the property owner's signed authorization to allow the Agency to inspect.*

Section 403.091(2)(a), Florida Statutes, requires consent for inspections and to avoid confusion and claims of trespass, we are requiring the consent to be in writing.

62-330.0511(2) *This rule states that it incorporates "Notice of Intent to Construct a Minor Silvicultural System," Form 62-330.0511(1), (November 16, 2016). The form filed with this Committee on March 2, 2018, pursuant to s. 120.54(3)(a)4., F.S., was dated October 1, 2013. As s. 120.54(3)(a)4., F.S., requires a copy of any material being incorporated by reference in the proposed rules to be filed with the Committee, if the Department intends to incorporate Form 62-330.0511(1), (November 16, 2016), that must also be the date of the material filed with the Committee.*

The Form provided to you on March 2, 2018, is the correct form. In November 2016, the Department made technical changes to Form 62-330.0511(1), and others, which did not require an amendment to the rule incorporating the form. The use of the November 16, 2016, date in the rule is incorrect. We will amend this subsection to reference the correct date, October 1, 2013, and will make conforming changes throughout for the other sections that incorporate forms that had technical changes in November 2016, i.e., sections 62-330.301(5)(f), 62-330.301(6)(h)-(j), 62-330.350(1)(d), and 62-330.417(5).

62-330.071(4) *This rule exempts the branches of the U.S. Department of Defense from having to pay processing fees for applications and notices under Rule Chapter 62-330, F.A.C. Please provide and explain the law implemented authorizing these exemptions.*

The Department does not have statutory authority to *exempt* the Department of Defense from permitting application fees. Rather, when this provision was drafted in 2012, the Department could find no clear authority to *charge* a fee because it could not determine whether Congress unambiguously waived the military's sovereign immunity regarding payment of permit fees.

62-330.417(5) *This rule states that it incorporates "Agreement to Maintain Public Access," Form 62-330.417(1), (November 16, 2016), and "Agreement to Maintain Public Access and Operate Stormwater System," (November 16, 2016). The forms filed with this Committee on March 2, 2018, pursuant to s. 120.54(3)(a)4., F.S., were dated October 1, 2013. As s. 120.54(3)(a)4.,*

F.S., requires a copy of any material being incorporated by reference in the proposed rules to be filed with the Committee, if the Department intends to incorporate Forms 62-330.417(1), (November 16, 2016), and 62-330.417(2), (November 16, 2016), that must also be the date of the materials filed with the Committee.

Please see response to comment on subsection 62-330.0511(2), F.A.C., above.

62-330.450(2) *This rule describes construction plans and calculations to be prepared by a "registered professional" to be included in the notice of intent to use a general permit. The definition of a "registered professional" does not appear to be included in this rule chapter. Failure to include an explanation for this term renders these rules impermissibly vague, and vests unbridled discretion in the agency to determine what constitutes a "registered professional."*

The definition of a registered professional is provided in the Applicant's Handbook Volume I, section 2.0, number 84. Rule 62-330.021, F.A.C. – Definitions, provides that "the terms used in this chapter are defined in section 2.0 of Volume I and section 2.1 of Volume II."

I appreciate your time and consideration of Chapter 62-330, F.A.C. If you have any additional questions or concerns or would like to discuss these matters further, please feel free to contact me by phone at 245-2277 or by e-mail at Stephanie.A.Gray@dep.state.fl.us.

Sincerely,


Stephanie A. Gray
Senior Attorney

cc: Heather Mason

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