

# **Rules of the South Florida Water Management District**

## **EXCEPTIONS TO THE UNIFORM RULES OF PROCEDURE**

### **Chapter 40E-0, F.A.C.**



**Effective: March 22, 2009**

On **August 20, 2010** minor corrections were made and incorporated to Chapter Rule 40E-0 which did not require rulemaking. Since the effective date reflects a rule adopted through rulemaking, the effective date above will remain.

**CHAPTER 40E-0****EXCEPTIONS TO THE UNIFORM RULES OF PROCEDURE**

- 40E-0.101 Scope
- 40E-0.102 Time for Consideration of Emergency Petition for Variance or Waiver
- 40E-0.103 Procedures for Processing Permit Applications
- 40E-0.105 Consideration of Intended Agency Decision on Permit Applications
- 40E-0.107 Emergency Action
- 40E-0.108 Emergency Authorization
- 40E-0.109 Point of Entry Into Proceedings and Mediation
- 40E-0.111 Exemptions and Variances for Well Construction Permits
- 40E-0.113 Variances from Specified Review Criteria for Environmental Resource Permits
- 40E-0.115 Variances from Water Use Restrictions

**40E-0.101 Scope.**

This chapter contains rules for which the South Florida Water Management District has been granted specific exceptions to Title 28, F.A.C., Uniform Rules of Procedure, by the Administration Commission pursuant to Section 120.54(5), F.S. Each rule listed in this chapter is also listed within its corresponding, substantive rule chapter within Title 40E, F.A.C.

*Rulemaking Authority 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 7-2-98.*

**40E-0.102 Time for Consideration of Emergency Petition for Variance or Waiver.**

Notwithstanding Rule 28-104.005, F.A.C., when a petition for an emergency variance or waiver requires action by the Governing Board, the Board shall grant or deny a petition for emergency variance or waiver within 30 days of its receipt or at the next regularly scheduled meeting for which notice may be properly given.

*Rulemaking Authority 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 7-2-98.*

**40E-0.103 Procedures for Processing Permit Applications.**

(1) In implementing the requirements in Rule 28-107.002, F.A.C., the following procedures apply to permit application review:

(a) Within 30 days of receipt of an application or notice of intent, the District shall review the application to determine whether all information needed to evaluate the application has been submitted. The District shall notify the applicant of the date on which the application is declared complete.

(b) If the District determines that the application is incomplete, the District shall request the information needed to complete the application within 30 days of its receipt. For individual permits and standard general permits, the applicant shall have 90 days from receipt of a timely request for additional information to submit that information to the District.

(c) The District may request information needed to clarify any additional information

submitted by the applicant, or to answer new questions raised by or related to the additional information within 30 days of its receipt. The applicant shall have 30 days from receipt of such a request in which to provide the necessary information. If the application is still incomplete after such information is submitted, the District shall notify the applicant within 30 days. The applicant shall have an additional 30 days to complete the application.

(d) Failure of an applicant to provide the timely requested information within these timeframes shall be considered grounds for denial of the application. Denial of an application for lack of completeness is without prejudice to the applicant's right to file a new application on the same subject matter. The District shall grant an extension upon a showing of a good faith effort by the applicant to comply with the timelines set forth herein. Unless an extension of time has been granted by the District, any application which remains incomplete 240 days after the original submittal date of an individual permit application or 90 days after the original submittal date of a notice of intent for general permit, shall be denied without prejudice.

(e) If the applicant submits information, either in response to or independent of a request by the District, which incorporates or results in a substantial modification in the proposed activity for which the applicant seeks a permit, the application will be considered an amended application. For purposes of this subsection, the term "substantial modification" shall mean a modification reasonably expected to result in water resource or environmental impacts which differ from those expected from the original application and require detailed review. Review timelines of the permit application or notice of intent will be reinitiated under this section.

(2) Upon a determination by the District that the activity requested in the notice of intent for any general permit requires an individual permit, the notice of intent shall be processed as an application for an individual permit, unless the permit applicant withdraws the application. If the application is processed as an individual permit, the permit applicant will be required to submit payment equal to the difference between the applicable fee for the individual permit and the fee previously submitted.

(3)(a) Agency action on individual permits and conceptual approvals shall occur within 90 days of receipt of a complete application, including receipt of all requested information and correction of any error or omission of which the applicant was timely notified.

(b) An authorization to proceed for standard general permits in Chapter 40E-20, F.A.C., shall occur within 60 days of receipt of a complete notice of intent, including receipt of all requested information and correction of any error or omission of which the applicant was timely notified.

(c) Agency action on a standard general permit application in Chapter 40E-40, F.A.C., shall occur within 60 days of receipt of a complete application, including receipt of all requested information and correction of any error or omission of which the applicant was timely notified.

(d) An authorization to proceed for general permits in Chapter 40E-30, F.A.C., shall be issued within 30 days of receipt of a complete notice of intent, including receipt of all requested information and correction of any error or omission of which the applicant was timely notified.

(e) Noticed general permits under Chapter 40E-400, F.A.C., may be utilized by the

applicant 30 days after the District receives the notice of intent, unless a notice that the project does not qualify for the noticed general permit is mailed by the District within 30 days, in accordance with Rule 40E-400.211, F.A.C. If notice that the proposed project does not qualify for the noticed general permit is mailed by the District to the applicant, the review process under subsection (1) shall be initiated or the applicant shall be required to apply for the appropriate permit if the requested activity is not covered by the noticed general permit rule.

*Rulemaking Authority 120.54(5), 120.60 FS. Law Implemented 120.54(5), 120.60 FS. History—New 7-2-98, Amended 6-12-00.*

#### **40E-0.105 Consideration of Intended Agency Decision on Permit Applications.**

(1) After the application for a permit is declared by staff to be complete, if a governing board hearing on the permit application is required, the District shall prepare a Staff Review Summary, which shall contain its recommendations regarding the subject application and which shall constitute intended agency decision. A notice of intended agency decision together with the Staff Review Summary shall be furnished to the applicant and any persons requesting the same pursuant to Rule 40E-1.6058, F.A.C., as applicable. The notice shall state the District Staff's recommendation that the Governing Board approve, deny, or approve with conditions the permit application and the reasons therefore.

(2) The Governing Board shall consider the application for a conceptual approval, individual environmental resource, individual surface water management, or individual water use permit application at its next available regularly scheduled regulatory meeting following the mailing either by regular United States mail or electronic mail of notice of intended agency decision, unless an administrative hearing is requested and granted pursuant to Section 120.569, F.S.

(3) In no case shall agency action be taken later than 90 days after the application for a conceptual approval, individual environmental resource permit, or individual water use permit is declared complete unless waived by the applicant or stayed by the filing of a petition for an administrative hearing. The permit applicant may voluntarily waive the timeline for governing action on the permit application in Section 120.60, F.S., in order to resolve any outstanding issues, including third party objections, regarding the project.

(4) Because the Governing Board may take a final agency action which materially differs from the noticed intended agency action, applicants and other interested persons should be prepared to defend their position regarding the permit application when it is considered by the Governing Board. If the Governing Board takes final agency action which materially differs from the intended agency decision, the District shall mail a notice of the final agency action either by regular United States mail or electronic mail to all persons who were notified of the intended agency decision.

*Rulemaking Authority 120.54(5), 120.60, 668.003, 668.004, 668.50 FS. Law Implemented 120.54(5), 120.60, 668.003, 668.004, 668.50 FS. History—New 7-2-98, Amended 3-22-09.*

#### **40E-0.107 Emergency Action.**

(1) An emergency exists when immediate action is necessary to protect public

health, safety or welfare; the health of animals, fish or aquatic life; the works of the District; a public water supply, or recreational, commercial, industrial, agricultural or other reasonable uses of land and water resources.

(2) The Executive Director may employ the resources of the District to take whatever remedial action necessary to alleviate the emergency condition without the issuance of an emergency order, or in the event an emergency order has been issued, after the expiration of the requisite time for compliance with that order.

(3) The procedures under this rule are provided in addition to the procedures set forth in Rule 28-106.501, F.A.C.

*Rulemaking Authority 120.54(5), 120.60, 373.439 FS. Law Implemented 120.54(5), 120.60, 373.439 FS. History—New 7-2-98.*

#### **40E-0.108 Emergency Authorization.**

(1) Permission to initiate activities regulated under Chapter 373, F.S., prior to the issuance of a permit or authorization of use may be applied for, in writing, when emergency conditions justify. However, no such permission shall be granted unless the proposed use is already under consideration for a permit under District rules. Mere carelessness or lack of planning on the part of the applicant shall not be sufficient grounds to warrant the granting of an emergency authorization.

(2) The Executive Director may grant an emergency authorization pursuant to Section 373.119(2), F.S. The emergency authorization shall be presented to the Governing Board for concurrence at its next regularly scheduled meeting. Failure to receive the Governing Board's concurrence shall automatically invalidate the emergency authorization.

*Rulemaking Authority 120.54(5), 120.60, 373.439 FS. Law Implemented 120.54(5), 120.60, 373.439 FS. History—New 7-2-98, 6-12-00.*

#### **40E-0.109 Point of Entry Into Proceedings and Mediation.**

Point of entry into proceedings determining substantial interests are governed by Rule 28-106.111, F.A.C., and this section.

(1)(a) "Receipt of written notice of agency decision" as set forth in Rule 28-106.111, F.A.C., means receipt of either written notice through regular United States mail, or electronic mail, or posting that the District has or intends to take final agency action, or publication of notice that the District has or intends to take final agency action.

(b) If notice is published pursuant to this chapter, publication shall constitute constructive notice to all persons. Until notice is published, the point of entry to request a formal or informal administrative proceeding shall remain open unless actual notice is received.

(2) If the Board takes action which substantially differs from the notice of intended agency decision, the applicant or persons who may be substantially affected shall have an additional point of entry pursuant to Section 28-106.111, F.A.C., unless otherwise provided by law. The Board action is considered to substantially differ from the notice of intended agency decision when the potential impact on water resources has changed.

(3) Notwithstanding Rule 28-106.111, F.A.C., intended agency decisions or agency decisions regarding consolidated applications for Environmental Resource Permits and

Use of Sovereign Submerged Lands pursuant to Section 373.427, F.S., shall provide a 14 day point of entry to file petitions for administrative hearing under Rule 28-106.111, F.A.C.

*Rulemaking Authority 120.54(5), 373.044, 373.113, 668.003, 668.004, 668.50 FS. Law Implemented 120.54(5), 120.569, 120.57, 120.60, 373.146, 373.413, 373.427, 668.003, 668.004, 668.50 FS. History—New 7-2-98, Amended 6-12-00, 3-22-09.*

#### **40E-0.111 Exemptions and Variances for Well Construction Permits.**

(1) The board finds that compliance with all the requirements of Part I of Chapter 40E-3, F.A.C., may result in an undue hardship for the construction, repair or abandonment of certain wells.

(2) Any affected person may request an exemption from any or all of these rules for an individual well by making written request which must include those specific requirements for which an exemption is requested, any alternate or substitute methods or conditions considered appropriate, and reasons why the exemption is considered necessary.

(3) The District shall grant the exemption by way of a variance if the proposal is in accordance with accepted public health and sanitary engineering principles and practices and will not adversely affect the water resource. The variance shall be the minimum necessary to ameliorate the hardship.

(4) If the request is for a variance from the requirement of obtaining a water use permit, the applicant must demonstrate that an application has been filed and a compelling necessity exists to commence the construction, repair or modification of a well while an application for a water use permit is pending. Issuance of the variance will not be evidence of any entitlement to the water use permit.

(5) Upon issuance of a variance the District shall impose such special conditions as may be necessary to protect the intent and purpose of Part III, Chapter 373, F.S., and this chapter.

(6) The variance under this rule is provided in addition to the variance and waiver procedures set forth in Rule 28-104, F.A.C., which implements Section 120.542, F.S.

*Rulemaking Authority 120.54(5), 373.044, 373.113, 373.171 FS. Law Implemented 120.54(5), 373.303, 373.308, 373.313, 373.316, 373.326 FS. History—New 9-2-98, Amended 6-12-00.*

#### **40E-0.113 Variances from Specified Review Criteria for Environmental Resource Permits.**

(1) The Governing Board is authorized to grant a variance from the provisions of Section 373.414, F.S., paragraph 40E-4.301(1)(e) or Rule 40E-4.302, F.A.C., pursuant to Section 403.201, F.S. The variance under this rule is provided in addition to the variance and waiver procedures set forth in Chapter 28-104, F.A.C., which implements Section 120.542, F.S.

(2) A person seeking a variance must demonstrate that any hardship asserted as a basis of the need for a variance is peculiar to the affected property and not self-imposed and that the grant of a variance will be consistent with the general intent and purpose of this chapter.

(3) Any person seeking a variance shall file a petition for a variance that contains the following information:

- (a) The petitioner's name and signature.
- (b) The statute or rule from which the variance is sought.
- (c) Facts showing that a variance should be granted for one of the reasons set forth in Section 403.201, F.S.

(d) The time period for which the variance is sought, not to exceed the time period permitted by law, including the reasons and facts supporting the time period.

(e) The requirements which the petitioner can meet including the date or time when the requirements will be met.

(f) The steps or measures the petitioner is taking to meet the requirement from which the variance is sought. If the request is pursuant to subsection 40E-4.311(1), F.A.C., above, the petitioner shall include a schedule when compliance will be achieved.

(g) The social, economic and environmental impacts on the applicant, residents of the area and of the state if the variance is granted.

(h) The social, economic and environmental impacts on the applicant, residents of the area and of the state if the variance is denied.

(4) The District shall review the application within a reasonable period of time after receipt to determine if the application is complete. If the application is determined to be incomplete, the applicant shall be afforded an opportunity to supply additional information before the District evaluates the merits of the request.

(5) The District shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition.

(6) The District shall prepare a notice of proposed agency action regarding the petition for a variance. The District shall publish this notice one time in the Florida Administrative Weekly, and one time in a newspaper of general circulation, as defined in Section 50.031, F.S., in the county in which the property for which the variance is sought is located.

(7) Renewals of variances shall be applied for in the same manner as the initial variance.

*Rulemaking Authority 373.044, 373.113, 373.171, 373.414(17) FS. Law Implemented 403.201 FS. History—New 9-2-98, Amended 6-12-00, 6-26-02.*

#### **40E-0.115 Variances from Water Use Restrictions.**

(1) All users requesting relief from the provisions of Chapter 40E-21, F.A.C., shall file an application for variance but must conform to water use restrictions until the Executive Director grants a temporary variance or the Board grants the variance.

(2) Criteria for Issuance – No application for variance shall be granted unless the applicant provides reasonable assurances that the variance will not otherwise be harmful to the water resources of the District and affirmatively demonstrates that one or more of the following circumstances exists:

- (a) The variance is essential to protect health or safety, or
- (b) Compliance with the particular rule or order from which a variance is sought will require measures which, because of their extent or cost, cannot be accomplished within

the anticipated duration of the shortage, or

(c) Alternative restrictions which achieve the same level of demand reduction as the restrictions from which a variance is sought are available and are binding and enforceable, or

(d) The applicant is a public or private utility that demonstrates that special circumstances exist which necessitate the issuance of a variance, or

(e) The applicant's source of water includes an approved aquifer storage and recovery installation or a water reclamation project.

(3) Limiting Conditions – Variances granted shall be subject to the following conditions:

(a) The variance granted shall be the minimum necessary to alleviate the circumstance for which the variance was requested under subsection (2).

(b) All variances shall expire upon a declaration by the Board that a water shortage no longer exists or when a more restrictive water shortage declaration is made, unless the Board specifies that the variance shall be in effect for a longer period of time, provided however that variance conditions which require the applicant to modify water use facilities shall remain in full force and effect until such modifications have been completed. However, when a new application for variance is filed within seven working days of the effective date of a more restrictive water shortage declaration, the existing variance shall remain in effect until final agency action on the application.

(c) Variances granted under paragraph (2)(b) may prescribe a timetable for compliance with the restrictions from which a variance was sought.

(4) Applications for Variance – The application shall contain the following:

(a) The applicant's name, address, telephone number and location of the property for which relief is requested.

(b) The specific rule, order, water shortage phase or restriction from which the applicant is requesting relief.

(c) A detailed statement of the facts which the applicant believes demonstrate that the request qualifies for a variance under subsection (2), including reports by qualified technical experts.

(d) A description of the relief desired.

(e) The period of time for which the variance is sought, including the reasons and facts in support thereof.

(f) The damage or harm resulting or which may result to the applicant from compliance with the rule or order.

(g) If the variance is sought under paragraph (2)(b), information identifying the restrictions which currently can be met, a description of the measures which would be necessary to meet all restrictions and the date when these measures could be completed.

(h) If the applicant is the owner or operator of a golf course whose need for a variance arises from the operational inability of its irrigation system or works to meet the front nine-back nine requirement in Chapter 40E-21, Part V, F.A.C., the applicant shall submit a map showing the proposed alternative division of the course in-half and an explanation of the applicant's proposed irrigation scheme.

(i) For applications for variance from restrictions on irrigation, a general description of the irrigation system, including pump or water system output and irrigated area, and

(j) Any other information, the applicant believes is material.

(5) Procedures.

(a) Within ten working days after receipt of a complete application for variance, which contains the information listed in subsection 40E-21.275(4), F.A.C., the staff shall recommend to the Executive Director whether the application complies with the provisions of subsections (2) through (4). The recommendation shall be in writing and shall constitute proposed agency action. The District shall set forth in writing the grounds or basis for denial of the variance and inform the applicant of the right to a hearing on the denial of the application by filing a petition. A copy of the recommendation shall be forwarded to the applicant. Any petition for hearing on an application for variance shall be considered a petition for informal proceedings in accordance with subsection 40E-1.571(2), F.A.C.

(b) The Executive Director or his designee shall review the application and the staff recommendation. Applications which do not require immediate action or which do not comply with the provisions of subsections (2) through (4) may be deferred for Board action. Applications which require immediate action and which comply with the provisions of subsections (2) through (4) may be temporarily granted by the Executive Director or his designee. Temporary variances granted by the Executive Director or his designee shall be presented to the Board for concurrence, rejection or modification.

(c) The Board shall consider all deferred applications as well as those temporarily granted by the Executive Director or his designee, at its next regularly scheduled meeting. The Board may grant, or deny the deferred applications and may concur in, reject or modify those variances temporarily granted by the Executive Director or his designee. All Board action denying applications for variances shall be by written order and copies shall be furnished to the applicant and the appropriate law enforcement officials. An applicant whose variance has been granted shall be furnished an appropriate notice of water shortage variance and any attachments which shall be prominently displayed at the applicant's place of use.

(d) The Board may revoke or modify a variance when it determines that the continued utilization of the variance is inconsistent with the objectives of the District.

(6) The variance under this rule is provided in addition to the variance and waiver procedures set forth in Rule 28-104, F.A.C., which implements Section 120.542, F.S.

*Rulemaking Authority 120.54(5), 373.044, 373.113 FS. Law Implemented 120.54(5), 373.175, 373.246 FS. History—New 9-2-98, Amended 6-12-00.*