

BEFORE THE GOVERNING BOARD OF THE
SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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Order No.: 2011-100-DAO
SOUTH FLORIDA
WATER MANAGEMENT DISTRICT

In re:

City of West Palm Beach, Florida
Pilot Project Authorizing
Temporary Interception and
Storage of Tidal Discharges
from the C-51 Canal

/

ORDER

The Governing Board of the South Florida Water Management District (hereinafter "District"), after considering recommendations of District staff and being otherwise fully apprised of the matter, issues this Order pursuant to Sections 373.083(2), 373.085, 373.086, and 373.171(1)(a), Fla. Stat., based on the following Findings of Fact and Ultimate Facts and Conclusions of Law.

FINDINGS OF FACT

1. The District is a public corporation of the State of Florida, existing pursuant to Chapter 25270, Laws of Florida, 1949, and operating pursuant to Chapter 373, Fla. Stat., and Title 40E, Fla. Admin. Code, as a multi-purpose water management district with its principal office at 3301 Gun Club Road, West Palm Beach, Florida. The District has the power and duty to protect Florida's water resources and to administer and enforce the provisions of Chapter 373, Fla. Stat., and the rules promulgated there under, Title 40E, Fla. Admin. Code. The District has jurisdiction over the matters addressed in this Order.

2. The City of West Palm Beach ("West Palm Beach") is authorized by the District to use water to provide drinking water to a service area of approximately

111,000 people, including hospitals, businesses, the Town of Palm Beach, the Town of South Palm Beach, and unincorporated sections of Palm Beach County.

3. West Palm Beach received Consumptive Use Permit #50-00615-W, from the District on October 12, 2006. West Palm Beach has a maximum allocation not to exceed 1,339 million gallons per month ("MGM") and 14,346 million gallons per year ("MGY") at its Clear Lake Water Treatment Plant.

4. The C-51 Canal is part of the Central and Southern Florida ("C&SF") Project for which the District is the designated local sponsor pursuant to Section 373.1501, Fla. Stat.

5. West Palm Beach requests temporary authorization to intercept and store water from the C-51 Canal when the C&SF Project Structure S-155 is releasing water to tide until such time as the water is needed for restoration of the natural system pursuant to an Everglades or other restoration project, for consumptive use, or for any other use within the District's authority to regulate such use.

6. After interception of water from the C-51 Canal, West Palm Beach would convey the water through the Stub Canal and into West Palm Beach's Renaissance Project by opening the Boyd Street Structure. A map depicting these features is attached hereto as Exhibit "A."

7. West Palm Beach will use its existing Boyd Street Structure to intercept water about to be released to tide through the S-155 Structure.

8. The intercepted water will be treated in West Palm Beach's existing permitted Renaissance Project. The Renaissance Pump Station will discharge the treated water into the south end of Clear Lake.

9. Operational records of the District show that for its period of record (January 1, 1978 through June 30, 2008), an average daily flow of 306 million gallons per day discharged via the S-155 Structure. While a larger portion of this flow occurs during the wet season, there usually is considerable flow during the first half of the dry season. In addition, some rainfall events during the dry season usually result in discharge even during the middle and end of the dry season. A graph depicting flow through the structure is attached hereto as Exhibit "B."

10. The District is presently engaged in restoration and preservation of natural systems located within North Palm Beach County as part of the Comprehensive Everglades Restoration Plan's (CERP) North Palm Beach County Part 1 Component. The North Palm Beach Part 1 Component continues the work identified in the Comprehensive Water Management Plan and Loxahatchee River Restoration Plan. Modification to the operation of the C-51 Canal structures is one element of these Plans.

11. A portion of the water presently flowing through the S-155 Structure will likely be used to meet the minimum flow and level ("MFL") recovery plan for the Northwest Fork of the Loxahatchee River pursuant to Rule 40E-8.421, Fla. Admin. Code. Pursuant to Rule 40E-8.421(1)(e), Fla. Admin. Code, and Sections 3.2.1.E.5(a) or 6(a) of the Basis of Review for Water Use Permit Applications within the South Florida Water Management District ("Basis of Review"), the District must certify the total amount of water made available by the Project for natural systems and other uses. The Project's construction is not complete. Thus, the District has not certified water available from this Project for any consumptive use, including use by West Palm Beach.

12. In addition to local runoff water, the C-51 Canal receives water from the L-10 and L-8 Canals and WCA-1 through the S-5AE Structure.

13. It has been asserted that authorizing the interception of water that would otherwise be released to tide would have positive impacts to the Lake Worth Lagoon ("Lagoon"). The Lagoon has experienced low salinity levels at various times. The central zone of the Lagoon occupies the area between the two inlets and is characterized by intermittent but fairly frequent low salinity events occurring for time periods ranging from days to weeks. Salinity levels during these events, corresponding to major discharge operations from the C-51 Canal through the S-155 Structure, drop to values of 5 to 15 practical salinity units ("psu"), with post discharge recovery to levels between 15 and 25 psu typically observed. Salinity variation of all zones of the Lagoon occur over a period of a few days to approximately one month, and prolonged periods of low salinity can occur, especially during periods of prolonged discharge.

14. Minimizing perturbation from large-scale C-51 Canal discharges and releasing freshwater to the estuary in a manner that more closely approaches natural volume and timing in relation to rainfall may help stabilize salinity regimes to be better aligned with those that are more supportive of healthier, more productive estuarine flora and fauna.

15. On June 16, 2010, the District issued Order No. 2010-118-DAO, authorizing West Palm Beach to intercept water from the C-51 Canal for one year. However, below average rains and runoff during this period did not allow sufficient opportunities for West Palm Beach to adequately test the viability and appropriateness of this water storage concept.

16. West Palm Beach seeks renewal of the authorization to intercept water from the C-51 Canal in order to store water that would otherwise be lost to tide and help reduce fresh water discharge impacts to Lake Worth Lagoon.

17. West Palm Beach seeks no compensation from the District for the voluntary use of its property to store the water as detailed in the aforementioned paragraphs.

18. The voluntary action of West Palm Beach to use its lands as a temporary storage site for water that would otherwise likely be lost to tide will also provide a water supply benefit to West Palm Beach without impacting other project benefits.

ULTIMATE FACTS AND CONCLUSIONS OF LAW

19. The C-51 Canal is part of the C&SF Project for which the District is the designated local sponsor pursuant to Section 373.1501, Fla. Stat. Pursuant to Sections 373.085 and 373.086, Fla. Stat., the District is authorized to operate the works of the District, including the S-155 Structure and regulate water in the C-51 Canal.

20. The Governing Board has authority to prescribe the manner in which local works provided by private persons will connect with and make use of the works or land of the District. § 373.085(1), Fla. Stat. (2010).

21. The Governing Board may “[i]ssue orders to implement or enforce any provisions of th[e] chapter or regulations.” § 373.083(2), Fla. Stat. (2010).

22. The Governing Board is also able to issue any orders for the modification of any existing uses, diversion facilities, or storage facilities to obtain the most beneficial use of the water resources and to protect the public health, safety, and welfare and the interest of the water users affected. § 373.171(1), Fla. Stat. (2010).

23. The Governing Board may 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 Part IV of Chapter 373, will not be inconsistent with the overall objectives of the District and will not be harmful to the water resources of the District. § 373.416(1), Fla. Stat. (2010).

24. Acting under these authorities, the District has the authority to allow for the interception and storage of water that is otherwise discharged to tide consistent with achieving the other District missions, including natural systems protection and restoration, such as Everglades restoration, protection of existing legal uses, flood protection, water quality, and water supply.

25. The District finds that this temporary, voluntary action of West Palm Beach to use its lands for a temporary storage site under the above described circumstances will assist the District in meeting its objective to provide water storage under Section 373.016, Fla. Stat.

ORDER

Based upon the Findings of Fact, Ultimate Facts and Conclusions of Law pursuant to the above cited laws, the Governing Board orders that:

26. Water about to be discharged to tide from the C-51 Canal may be intercepted and stored within the West Palm Beach lake system as set forth below (and specified, in part, in Exhibit "C"):

a. Normal Open Criteria: This Order authorizes the use of the West Palm Beach Boyd Street Structure to intercept C-51 Canal water before it is discharged to tide through the coastal S-155 Structure when either: 1) water is being discharged to tide

through the S-155 Structure; or, 2) the stage at the Water View Gauge (WATER or WTVW) is at or above 8.2 feet NGVD. It is the responsibility of West Palm Beach to identify when these conditions are met by reviewing the SFWMD's Current Reading Web Page.

b. Special Open Criteria: On a case-by-case basis, the District may approve withdrawals by the City if the headwater stage of the S-155 Structure is above 8.0 feet NGVD and rising, while considering factors, including, but not limited to, whether the connected C-15 and/or C-16 Canals are discharging.

c. Normal Close Criteria: West Palm Beach shall review the SFWMD's Current Reading page or, in its absence, contact the Control Room and determine whether the close criteria has occurred at least once a day and early enough to allow time for the interception operation to be terminated by no later than 6:00 p.m. The authorization to intercept water will end when the stage at the Water View location is below 8.1 feet NGVD.

d. Special Close Criteria: The City of West Palm Beach will terminate the interception of water as soon as safely possible when directed by the SFWMD's Operations Control Center ("OCC").

27. The City shall measure the volume of water intercepted from the C-51 Basin via the Stub Canal at the Renaissance Pump Station. In order to accurately estimate the volume of intercepted water, the City will close the Boyd Street gates and restore the control elevation of the Stub Canal north of Boyd Street, to account for all water intercepted. Also, the City will not engage in the intercepting of water from the C-51 Basin when stormwater runoff is entering the Stub Canal north of Boyd Street.

28. West Palm Beach will report the amount of water intercepted monthly on a quarterly basis. This report shall reference West Palm Beach's consumptive use permit number and this Order and be provided to the Section Leader, Environmental Resource Compliance Division (MSC 4230).

29. West Palm Beach shall comply with the conditions of its consumptive use permits, Permit Nos. 50-00615-W and 50-07890-W. The limiting conditions and withdrawal limitations set forth in West Palm Beach's Permits are not modified or otherwise affected by this Order.

30. West Palm Beach may not include any water intercepted from the C-51 Canal pursuant to this Order in any modeling impact assessments submitted in accordance with Section 1.7.5.2 of the Basis of Review in any future modification of its consumptive use permits.

31. This Order authorizes West Palm Beach to take actions under Chapter 373, Fla. Stat., as provided herein. This Order does not relieve West Palm Beach from the requirements to obtain any other federal, state, or local authorizations.

32. The temporary diversion of water from the C-51 Canal shall not be construed as a certification of use by West Palm Beach pursuant to Rule 40E-8.421(1)(e), Fla. Admin. Code, or the Basis of Review criteria 3.2.1.E. 5(a) or 6(a).

33. This Order does not grant any legal right to water as set forth in Chapter 373 Fla. Stat., and associated District rules and regulations over the water intercepted and stored under this Order.

34. This Order does not convey any property right to West Palm Beach, nor any rights and privileges other than those specified in this Order.

35. This Order shall not be construed as a substitute for, or waiver of, any right of way, surface water management, water use, or other permits required of the City under the District's rules and regulations.

36. West Palm Beach shall insure that harmful impacts to the water resources, off-site land uses, or existing legal uses of water do not occur as a result of this Order. In the event such harmful impacts result from actions authorized by this Order, West Palm Beach shall implement all necessary actions, as directed by the District, to cease such harmful impacts and, if necessary, to mitigate such impacts. Failure to comply with this requirement shall be considered a violation of this Order.

37. West Palm Beach shall hold and save the District harmless from any and all damages, claims, or liabilities which may arise by reason of the construction, operation, maintenance or use of any facility authorized by this Order.

38. Failure to comply with the terms of this Order shall constitute a violation of a District Order under Chapter 373, Fla. Stat., and enforcement proceedings may be brought in any appropriate administrative or judicial forum.

39. If the District petitions or sues for enforcement of the terms of this Order, the District reserves the right to initiate appropriate legal action, to impose civil penalties, and collect attorney's fees and costs.

40. This Order may be modified or amended at any time, as appropriate for the protection of the public health, safety, and welfare and the water resources of south Florida by the Governing Board, Executive Director, or Executive Director's designee. The Executive Director may require West Palm Beach to cease interception and storage activities under this Order at any time.

41. This Order shall terminate upon written notice from the District's Executive Director or within one year from the date of execution, whichever is sooner. Extension of the duration of this Order may be requested in writing to the District's Executive Director. In determining whether or not to recommend extending the duration of this Order, the Executive Director shall consider West Palm Beach's status and compliance history with this Order and its Permits, projected availability of water, status of restoration projects, the needs of existing and future water users, and the water resources of the area.

42. This is a final order from the District, pursuant to Section 120.52(7), Fla. Stat., and is final and effective on the date filed with the Clerk of the District unless a petition for administrative hearing is filed in accordance with Chapter 120, Fla. Stat., or any other applicable state law. Upon the timely filing of a petition, the Order will not be effective until further order from the District.

43. A Notice of Rights is attached as Exhibit "D."

DONE AND SO ORDERED in West Palm Beach, Florida, on this 14th day of July 2011.

**SOUTH FLORIDA WATER
MANAGEMENT DISTRICT**
By its Governing Board




MELISSA L. MEEKER
Executive Director

Attested:


District Clerk/Assistant Secretary
Dated: July 14, 2011

Legal Form Approved:


Jennifer Bokankowitz, Esq.

West Palm Beach Pilot Project



S-155 SPILLWAY ON W.P.B. CANAL AT U.S. 1

Station: S155_S Freq: DA DataType: FLOW Stat: MEAN Agency: WMD Recorder: NA opNum: 0 Dbkey: 03680

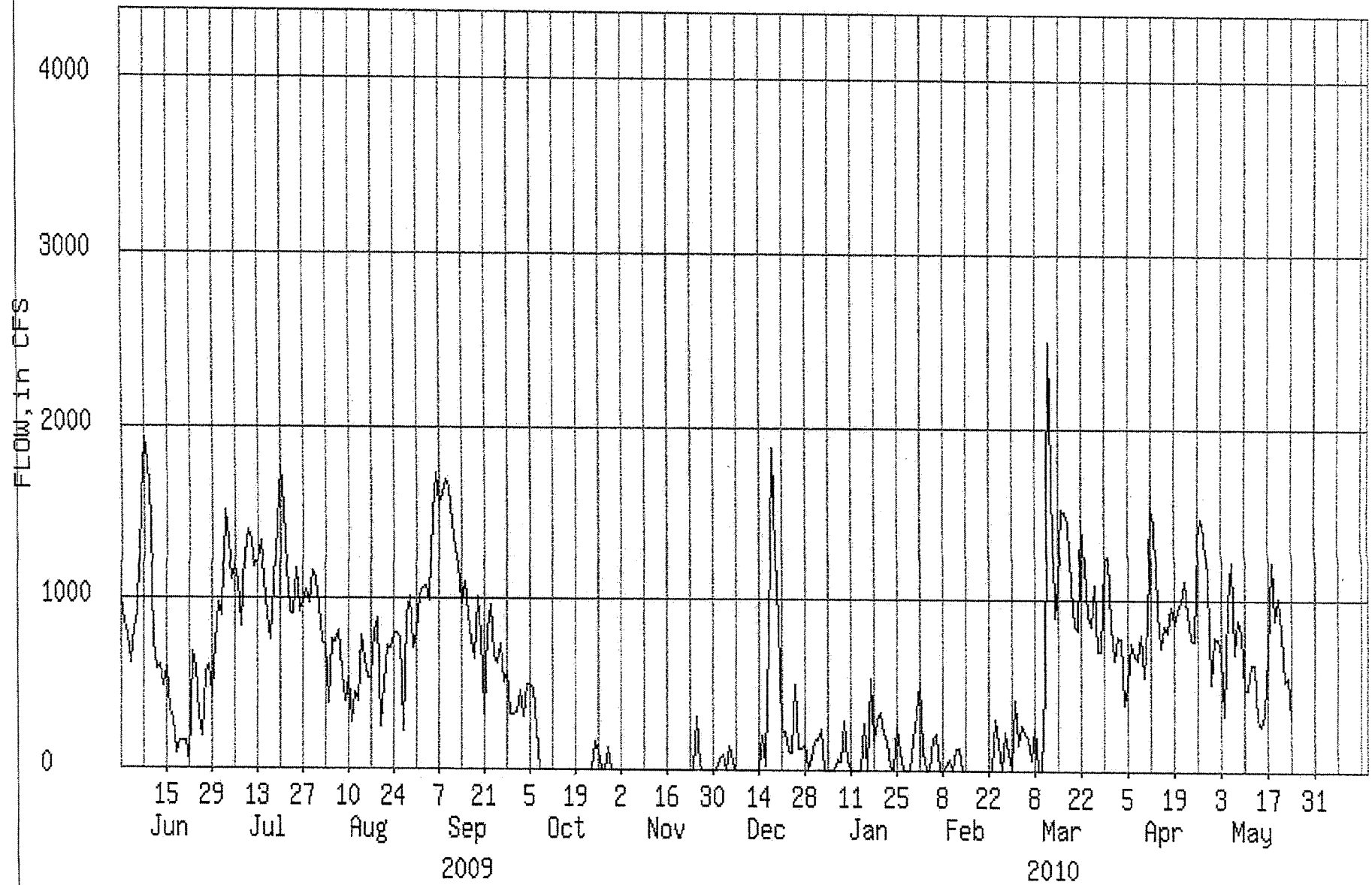


EXHIBIT B

EXHIBIT C

Annotated Interception Criteria for West Palm Beach's Boyd Street Structure

Required Conditions to Initially Open^{*}:

1. S-155 Discharging to Tide (one, two, or three gates open); or ,
2. SFWMD's Real Time WPB WATER (WTVW) Stage \geq 8.2 feet NGVD and the stage on the south side of Boyd Street Structure \geq to stage on the north side; or;
3. As directed anytime 24/7 by SFWMD's Operations Control Center ("OCC").

Required Conditions to Remain Open^{*}:

1. S-155 is discharging to tide (one, two, or three gates open); or
2. SFWMD's real time WPB WATER (WTVW) Stage \geq 8.1 feet NGVD; or
3. As directed anytime 24/7 by SFWMD's Operations Control Center ("OCC").

Required Conditions for Immediate Closure:

1. SFWMD's real time WPB WATER (WTVW) Stage $<$ 8.1 feet NGVD and all gates at S-155 are closed; or,
2. As directed anytime 24/7 by SFWMD's Operations Control Center ("OCC").

Conditions Related to Openings and Closures:

- All terms and conditions of SFWMD's Order to the West Palm Beach to intercept and store excess water from the C-51 Canal.
- West Palm Beach must provide one primary and one backup 24/7 emergency phone contact numbers.
- When reading WATER (WTVW) Stage on SFWMD's Website(s), West Palm Beach must always confirm the reading is current (e.g., the date and time stamp for the Stage must not be more than one hour old).
- If Water (WTVW)'s Stage date and time stamp is more than one hour old, West Palm Beach must immediately call SFWMD's OCC (561-682-6116) for the latest reading.

Notes and Additional information:

- 24/7 means available twenty-four hours per day seven days per week;
- WATER Gauge is located on Congress Avenue, one-half mile south of Okeechobee Blvd.;
- WATER Stage is on SFWMD's West Palm Beach region of SFWMD's Web Page; Web address (URL) to access SFWMD's WATER (WTVW) real time readings:
http://www.sfwmd.gov/portal/pls/portal/realtime.realtime_app.rtv2?p_op=WEST_PALM_BEACH

*Except during the conditions when Boyd Street Structure is authorized via SFWMD Permit to discharge storm water south to Palm Beach County's Stub Canal. The City of West Palm Beach remains authorized to discharge water through the Boyd Street if the criteria of that Permit are met.

NOTICE OF RIGHTS

As required by Sections 120.569(1), and 120.60(3), Fla. Stat., following is notice of the opportunities which may be available for administrative hearing or judicial review when the substantial interests of a party are determined by an agency. Please note that this Notice of Rights is not intended to provide legal advice. Not all the legal proceedings detailed below may be an applicable or appropriate remedy. You may wish to consult an attorney regarding your legal rights.

RIGHT TO REQUEST ADMINISTRATIVE HEARING

A person whose substantial interests are or may be affected by the South Florida Water Management District's (SFWMD or District) action has the right to request an administrative hearing on that action pursuant to Sections 120.569 and 120.57, Fla. Stat. Persons seeking a hearing on a District decision which does or may determine their substantial interests shall file a petition for hearing with the District Clerk within 21 days of receipt of written notice of the decision, unless one of the following shorter time periods apply: 1) within 14 days of the notice of consolidated intent to grant or deny concurrently reviewed applications for environmental resource permits and use of sovereign submerged lands pursuant to Section 373.427, Fla. Stat.; or 2) within 14 days of service of an Administrative Order pursuant to Subsection 373.119(1), Fla. Stat. "Receipt of written notice of agency decision" means receipt of either written notice through 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. Any person who receives written notice of a SFWMD decision and fails to file a written request for hearing within the timeframe described above waives the right to request a hearing on that decision.

Filing Instructions

The Petition must be filed with the Office of the District Clerk of the SFWMD. Filings with the District Clerk may be made by mail, hand-delivery or facsimile. **Filings by e-mail will not be accepted.** Any person wishing to receive a clerked copy with the date and time stamped must provide an additional copy. A petition for administrative hearing is deemed filed upon receipt during normal business hours by the District Clerk at SFWMD headquarters in West Palm Beach, Florida. Any document received by the office of the SFWMD Clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day. Additional filing instructions are as follows:

- Filings by mail must be addressed to the Office of the SFWMD Clerk, P.O. Box 24680, West Palm Beach, Florida 33416.
- Filings by hand-delivery must be delivered to the Office of the SFWMD Clerk. **Delivery of a petition to the SFWMD's security desk does not constitute filing. To ensure proper filing, it will be necessary to request the SFWMD's security officer to contact the Clerk's office.** An employee of the SFWMD's Clerk's office will receive and file the petition.
- Filings by facsimile must be transmitted to the SFWMD Clerk's Office at (561) 682-6010. Pursuant to Subsections 28-106.104(7), (8) and (9), Fla. Admin. Code, a party who files a document by facsimile represents that the original physically signed document will be retained by that party for the duration of that proceeding and of any subsequent appeal or subsequent proceeding in that cause. Any party who elects to file any document by facsimile shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the clerk as a result. The filing date for a document filed by facsimile shall be the date the SFWMD Clerk receives the complete document.

Initiation of an Administrative Hearing

Pursuant to Rules 28-106.201 and 28-106.301, Fla. Admin. Code, initiation of an administrative hearing shall be made by written petition to the SFWMD in legible form and on 8 and 1/2 by 11 inch white paper. All petitions shall contain:

1. Identification of the action being contested, including the permit number, application number, District file number or any other SFWMD identification number, if known.
2. The name, address and telephone number of the petitioner and petitioner's representative, if any.
3. An explanation of how the petitioner's substantial interests will be affected by the agency determination.
4. A statement of when and how the petitioner received notice of the SFWMD's decision.
5. A statement of all disputed issues of material fact. If there are none, the petition must so indicate.
6. A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the SFWMD's proposed action.
7. A statement of the specific rules or statutes the petitioner contends require reversal or modification of the SFWMD's proposed action.
8. If disputed issues of material fact exist, the statement must also include an explanation of how the alleged facts relate to the specific rules or statutes.
9. A statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the SFWMD to take with respect to the SFWMD's proposed action.

A person may file a request for an extension of time for filing a petition. The SFWMD may, for good cause, grant the request. Requests for extension of time must be filed with the SFWMD prior to the deadline for filing a petition for hearing. Such requests for extension shall contain a certificate that the moving party has consulted with all other parties concerning the extension and that the SFWMD and any other parties agree to or oppose the extension. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

If the District takes action with substantially different impacts on water resources from the notice of intended agency decision, the persons who may be substantially affected shall have an additional point of entry pursuant to Rule 28-106.111, Fla. Admin. Code, unless otherwise provided by law.

Mediation

The procedures for pursuing mediation are set forth in Section 120.573, Fla. Stat., and Rules 28-106.111 and 28-106.401-.405, Fla. Admin. Code. The SFWMD is not proposing mediation for this agency action under Section 120.573, Fla. Stat., at this time.

RIGHT TO SEEK JUDICIAL REVIEW

Pursuant to Sections 120.60(3) and 120.68, Fla. Stat., a party who is adversely affected by final SFWMD action may seek judicial review of the SFWMD's final decision by filing a notice of appeal pursuant to Florida Rule of Appellate Procedure 9.110 in the Fourth District Court of Appeal or in the appellate district where a party resides and filing a second copy of the notice with the SFWMD Clerk within 30 days of rendering of the final SFWMD action.