

Updated 2/8/17

Dear Applicant:

**SUBJECT: NOTICE OF RELIEF TO PERSONS SUBJECT TO SOUTH FLORIDA
WATER MANAGEMENT DISTRICT (DISTRICT) RIGHT OF WAY
REGULATIONS**

The business community advised the legislature that strict application of rule requirements could lead to unreasonable, unfair and unintended results in certain limited circumstances.

In recognition of this, in 1996, the legislature adopted a procedure for any state agency to provide relief, in certain limited circumstances, from the strict application of rule requirements. This can be done through waivers and variances.

Your request for issuance of a Right of Way Occupancy Permit to utilize the Works and Lands of the District does not meet, or is contrary to, the District's criteria. Therefore, it will be necessary for you to file a Petition for Waiver with the Clerk of the South Florida Water Management District.

Enclosed are copies of the following documents and forms to help you understand why a waiver is necessary, the remedies available to you, the time it takes to complete the waiver process, and what information you must include in your petition.

- √ Checklist of Required Information;
- √ Sample Petition Form;
- √ Blank Petition Form;
- √ §120.542, Fla. Stat. – Variances and Waivers;
- √ Rule 28-104.002 through 28-104.006, of Fla. Admin. Code, "Uniform Rules of Procedure Pertaining to Variances and Waivers";
- √ §373.085, Fla. Stat. – the underlying Statute;

If you wish to obtain a variance or waiver from the District's right-of-way regulations, your Petition must be in substantial compliance with the requirements of Rule 28-104.002, Fla. Admin. Code and must be filed with the District's Clerk's Office.

The decision to grant or deny a petition for variance or waiver is subject to the same type of administrative procedures as for a decision to grant or deny a permit. In other words, a petition for formal administrative hearing could be filed.

The District's Right of Way Rules and Permit Criteria Manual can be viewed on the Internet by the following steps:

www.sfwmd.gov (the District's web site)

Doing Business With Us (on top of page)

Permits (left hand column)

Select Permits Again to Link to Right of Way Permits (*The ROW Permit Information Manual containing the ROW Rules link can be found on this page.*)

If you do not have access to the internet or have any questions regarding your request for a permit, you may contact the Right of Way Section at (561) 682-6035 or the individual who is reviewing your application/project. If you have questions concerning the legal process for the Petition for Waiver, please contact Juli Russell, Paralegal Specialist, Office of Counsel at (561) 682-6268.

Sincerely,

Right of Way Section
Field Operations
South Florida Water Management District

Attachments

CHECKLIST OF REQUIRED INFORMATION
(Page 1 of 3)

Petitions for waivers may be filed pursuant to Section 120.542, F.S. (2001). Requirements for a waiver are set forth in rule 28-104.002, Fla. Admin. Code. This checklist is designed to assist the Petitioner in the development of a petition that meets the requirements of this rule and requests basic information necessary in the review of a petition. Pursuant to 28-104.002, Fla. Admin. Code and §120.542, Fla. Stat., your petition must contain the following information:

- (1) *Caption: Petition for Waiver of Rule (40E-_____); (Rule 28-104.002(a), Fla. Admin. Code)***

State the Rule Number(s) you are requesting relief from, you will most likely need waivers of one or both of the following rules:

40E-6.011(4) and (6), F.A.C. - if you wish to place something on the District's property (right of way) within 40 feet of the top of the canal bank; and/or

40E-6.221(3)(j), F.A.C. - if you are requesting to place something on the District's property (right of way) that does not meet or is contrary to the District's criteria, such as the low member elevation of a pile-supported dock facility, utility crossing, vehicular/pedestrian bridge, and/or the minimum horizontal clearance of a pile-supported facility and/or encroachments within the District's designated equipment staging areas, etc.

- (2) *Name, address, telephone number, and any facsimile number of petitioner (you) or your attorney or qualified representative, if any; (Rule 28-104.002(b)(c), Fla. Admin. Code)***

There is a place for this at the bottom of the sample petition in the signature block.

- (3) *The applicable rule or portion of the rule; (Rule 28-104.002(d), Fla. Admin. Code)***

This would be the same rule number(s) you reflected in the caption (item 1).

- (4) *The citation to the statute the rule is implementing; (Rule 28-104.002(e), Fla. Admin. Code)***

State rule(s) in writing.

CHECKLIST OF REQUIRED INFORMATION
(Page 2 of 3)

(5) *The type of action requested. (Rule 28-104.002(f), Fla. Admin. Code)*

State facilities being applied for.

(6) *The specific facts that demonstrate a substantial hardship or a violation of principles of fairness that would justify a waiver or variance for the petitioner. (Rule 28-104.002(g), Fla. Admin. Code)*

Pursuant to §120.542, Fla. Stat. "Substantial hardship" means "a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver". Therefore, documentation must be provided establishing that a "substantial hardship" will result to the Petitioner. If the substantial hardship is economic in nature, financial documents should be submitted to review for a determination as to whether the estimated costs will result in a substantial hardship to the Petitioner.

The statute states that "Principles of fairness" are violated "when literal application of the rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule". This exception is used when application of a rule would cost one entity or person substantially more than those similarly situated, when application of a rule would unintentionally penalize an entity's or person's recent good-faith activities, or when regulatory costs to an entity or person are simply not worth the minimal social benefits that compliance with the rule would produce.

If you believe that "principles of fairness" have been violated, please submit information and analysis that would demonstrate that literal application of the rules would violate the "principles of fairness" and include an explanation of how this rule affects you in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

(7) *The reason why the variance or the waiver requested would serve the purpose of the underlying statute.*

The underlying statute provides the District's governing board the authority to prescribe how 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.

CHECKLIST OF REQUIRED INFORMATION
(Page 3 of 3)

To explain how your request for waiver would serve the purpose of the underlying statute, you need to state why you believe that what you are asking for will not interfere with the District's maintenance and operations procedures. You will need to provide appropriate documentation that the proposed revisions are consistent with the purpose of the underlying statute. This documentation shall include, though not be limited to, a discussion of the issues raised by the following questions:

1. How will the design of the facility/use accommodate the fluctuation of the water levels?
2. How will your facility be designed so as not to interfere with regular and emergency operation and maintenance activities of the right of way and/or the canal?

(8) *A statement of whether the variance or waiver is permanent or temporary. If the variance or waiver is temporary, the petition must include the dates indicating the duration of the requested variance or waiver.*

While it is only necessary to include in the petition the items set forth in Rule 28-104.002, Fla. Admin. Code, the Right of Way Occupancy Permit Application Number the waiver is referencing will expedite the processing of the petition.

SAMPLE

Application #: _____

PETITION FOR WAIVER of Rule(s) 1

To be filed with the District Clerk:

Please consider this a formal request for waiver of the above referenced rules of the South Florida Water Management District (District) with regards to my pending Right of Way Occupancy Permit application.

Section 373.085, Fla. Stat., states that the Governing Board has the authority to prescribe the manner in which persons will connect with and make use of the works or land of the District and to issue permits therefore. Pursuant to Section 120.542, Florida Statutes, I

am requesting waiver of Rule(s), 3 Fla. Admin. Code, and the Basis of Review for Use or Occupancy of the Works or Lands of the District Permit Applications within the South Florida Water Management District, incorporated by reference in Rule 40E-6.091(1), Fla. Admin. Code, which governs

4

_____.

The waiver being requested is 8. (State whether the waiver is permanent or temporary. If temporary, show dates.

I have requested approval of a permit for 5
along the _____ Canal, and have been informed that it does not meet criteria because

_____.

(State whether use or facility exists and how long it has existed).

Additionally, I am requesting a waiver because strict application of the rule would

6

Although my request does not meet criteria, the waiver I am requesting still provides for the purpose of the underlying statute as

7

I hereby request waiver of the 90-day review periods for my permit application and my petition for waiver, as provided under Chapter 120, Fla. Stat, including, but not limited to, § 120.542(8), and as provided under Title 28 and Chapters 40E-1 and 40E-6, F.A.C., so that agency action may be taken simultaneously on my application for Right of Way Occupancy Permit and this associated Petition for Waiver.

Signature of petitioner/Authorized Representative

2

Name *(please print)*

Address

Telephone Number

Facsimile Number

Page 2 of 2 of Petition For Waiver

Application #_____.

PETITION FOR WAIVER OF RULE(S): _____ F.A.C.

To be filed with the District Clerk:

Please consider this a formal request for waiver of the above referenced rules of the South Florida Water Management District (District) with regards to my pending Right of Way Occupancy Permit application.

Section 373.085, Fla. Stat., states that the Governing Board has the authority to prescribe the manner in which persons will connect with and make use of the works or land of the District and to issue permits therefore. Pursuant to 120.542, Florida Stat., I am requesting waiver of Rule(s) _____ Fla. Admin. Code, and the Basis of Review for Use or Occupancy of the Works or Lands of the District Permit Application within the South Florida Water Management District, incorporated by reference in Rule 40E-6.091(1), Fla. Admin. Code, which governs:

_____ .

The waiver being requested is _____. (State whether the waiver is permanent or temporary. If temporary, show dates).

I have requested approval of a permit for:

along the _____ Canal, and have been informed that it does not meet criteria because _____

_____ .

(State whether use or facility exists and how long it has existed) _____ .

Additionally, I am requesting a waiver because strict application of the criteria or rule would create:

_____ .

PETITION FOR WAIVER (PAGE TWO):

Although my request does not meet the District's criteria, the waiver I am requesting still provides for the purpose of the underlying statute as:

I hereby request waiver of the 90-day review periods for my permit application and my petition for waiver, as provided under Chapter 120, Fla. Stat, including, but not limited to, § 120.542(8), and as provided under Title 28 and Chapters 40E-1 and 40E-6, F.A.C., so that agency action may be taken simultaneously on my application for Right of Way Occupancy Permit and this associated Petition for Waiver.

Signature of petitioner/Authorized Representative

Name *(please print)*

Address

Telephone Number

Facsimile Number

120.542 Variances and waivers.--

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. A public employee is not a person subject to regulation under this section for the purpose of petitioning for a variance or waiver to a rule that affects that public employee in his or her capacity as a public employee. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. An agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved. This section does not authorize agencies to grant variances or waivers to statutes or to rules required by the Federal Government for the agency's implementation or retention of any federally approved or delegated program, except as allowed by the program or when the variance or waiver is also approved by the appropriate agency of the Federal Government. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

(3) The Governor and Cabinet, sitting as the Administration Commission, shall adopt uniform rules of procedure pursuant to the requirements of s. 120.54(5) establishing procedures for granting or denying petitions for variances and waivers. The uniform rules shall include procedures for the granting, denying, or revoking of emergency and temporary variances and waivers. Such provisions may provide for expedited timeframes, waiver of or limited public notice, and limitations on comments on the petition in the case of such temporary or emergency variances and waivers.

(4) Agencies shall advise persons of the remedies available through this section and shall provide copies of this section, the uniform rules on variances and waivers, and, if requested, the underlying statute, to persons who inquire about the possibility of relief from rule requirements.

(5) A person who is subject to regulation by an agency rule may file a petition with that agency, with a copy to the committee, requesting a variance or waiver from the agency's rule. In addition to any requirements mandated by the uniform rules, each petition shall specify:

(a) The rule from which a variance or waiver is requested.

(b) The type of action requested.

(c) The specific facts that would justify a waiver or variance for the petitioner.

(d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute.

(6) Within 15 days after receipt of a petition for variance or waiver, an agency shall provide notice of the petition to the Department of State, which shall publish notice of the petition in the first available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which variance or waiver is sought, and an explanation of how a copy of the petition can be obtained. The uniform rules shall provide a means for interested persons to provide comments on the petition.

(7) Except for requests for emergency variances or waivers, within 30 days after receipt of a petition for a variance or waiver, an agency shall review the petition and request submittal of all additional information that the agency is permitted by this section to require. Within 30 days after receipt of such additional information, the agency shall review it and may request only that information needed to clarify the additional information or to answer new questions raised by or directly related to the additional information. If the petitioner asserts that any request for additional information is not authorized by law or by rule of the affected agency, the agency shall proceed, at the petitioner's written request, to process the petition.

(8) An agency 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. A petition not granted or denied within 90 days after receipt of a completed petition is deemed approved. A copy of the order granting or denying the petition shall be filed with the committee and shall contain a statement of the relevant facts and reasons supporting the agency's action. The agency shall provide notice of the disposition of the petition to the Department of State, which shall publish the notice in the next available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which the waiver or variance is sought, a reference to the place and date of publication of the notice of the petition, the date of the order denying or approving the variance or waiver, the general basis for the agency decision, and an explanation of how a copy of the order can be obtained. The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57. Any proceeding pursuant to ss. 120.569 and 120.57 in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter.

(9) Each agency shall maintain a record of the type and disposition of each petition, including temporary or emergency variances and waivers, filed pursuant to this section. On October 1 of each year, each agency shall file a report with the Governor, the President of the Senate, and the Speaker of the House of Representatives listing the number of petitions filed requesting variances to each agency rule, the number of petitions filed requesting waivers to each agency rule, and the disposition of all petitions. Temporary or emergency variances and waivers, and the reasons for granting or denying temporary or emergency variances and waivers, shall be identified separately from other waivers and variances.

History.--s. 12, ch. 96-159; s. 5, ch. 97-176.

CHAPTER 28-104 VARIANCE OR WAIVER

28-104.001	Purpose; Construction
28-104.002	Petition for Variance or Waiver
28-104.003	Comments on Petition
28-104.004	Petition for Emergency Variance or Waiver
28-104.005	Time for Consideration of Emergency Petition
28-104.0051	Revocation of Emergency or Temporary Variance or Waiver
28-104.006	Request for Information

28-104.001 Purpose; Construction.

This chapter implements Section 120.542, F.S., by establishing the procedures for granting or denying petitions for variances and waivers of agency rules, and, should be read in conjunction with the provisions of Sections 120.52(18), 120.52(19) and 120.542, F.S.

Rulemaking Authority 14.202, 120.542 FS. Law Implemented 120.542(5)(b)8. FS. History—New 4-1-97, Amended 1-15-07.

28-104.002 Petition for Variance or Waiver.

(1) A petition for a variance from or waiver of an agency rule shall be filed with the clerk of the agency that adopted the rule, with a copy to the Joint Administrative Procedures Committee, Room 680, Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400.

(2) The petition must include the following information:

(a) The caption shall read:

Petition for (Variance from) or (Waiver of) Rule (Citation)

(b) The name, address, any e-mail address, telephone number, and any facsimile number of the petitioner, if the party is not represented by an attorney or a qualified representative;

(c) The name, address, e-mail address, telephone number, and any facsimile number of the attorney or qualified representative of the petitioner, if any;

(d) The applicable rule or portion of the rule;

(e) The citation to the statute the rule is implementing;

(f) The type of action requested;

(g) The specific facts that demonstrate a substantial hardship or a violation of principles of fairness that would justify a waiver or variance for the petitioner;

(h) The reason why the variance or the waiver requested would serve the purposes of the underlying statute; and

(i) A statement whether the variance or waiver is permanent or temporary. If the variance or waiver is temporary, the petition shall include the dates indicating the duration of the requested variance or waiver.

(3) The petition for a variance or waiver may be withdrawn by the applicant at any time before final agency action.

(4) Upon receipt of a petition for variance or waiver, the agency shall furnish a copy of the petition to any other agency responsible for implementing the rule.

Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5)(b)8. FS. History—New 4-1-97, Amended 3-18-98, 2-5-13.

28-104.003 Comments on Petition.

(1) Any interested person or other agency may submit written comments on the petition for a variance or waiver within 14 days after the notice required by Section 120.542(6), F.S. The agency shall state in any

order disposing of the petition whether comments were received by the agency.

(2) The agency shall maintain the comments as part of the record.

(3) The right to comment pursuant to this section does not alone confer party status in any proceeding arising from a petition for variance or waiver.

Rulemaking Authority 14.202, 120.54(5)(b)8. FS. Law Implemented 120.54(5)(b)8. FS. History—New 4-1-97, Amended 2-5-13.

28-104.004 Petition for Emergency Variance or Waiver.

(1) A person requesting an emergency variance from or waiver of an agency rule shall so state in the caption to the petition.

(2) In addition to the other requirements of Section 120.542(5), F.S., and this chapter, the petition shall specify:

(a) The specific facts that make the situation an emergency; and

(b) The specific facts to show that the petitioner will suffer an immediate adverse effect unless the variance or waiver is issued more expeditiously than the time frames provided in Section 120.542, F.S.

Rulemaking Authority 14.202, 120.54(5)(b)8. FS. Law Implemented 120.54(5)(b)8. FS. History—New 4-1-97.

28-104.005 Time for Consideration of Emergency Petition.

(1) Within 5 days after filing a petition for emergency variance or waiver with the agency clerk, the agency shall give notice of receipt of the petition on its website, if it has one. The agency shall also give notice by any procedure that is fair under the circumstances or provide notice of the petition to the Department of State for publication in the first available issue of the Florida Administrative Register. Any notice under this subsection shall inform interested persons of the right to submit comments. Interested persons or other agencies may submit written comments on the petition for emergency variance or waiver within 5 days after publication of the notice required herein. The notice and comment requirements in this subsection shall not apply if the agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, which final order shall recite with particularity the facts underlying such finding.

(2) The agency shall grant or deny a petition for emergency variance or waiver or determine that the request is not an emergency within 30 days of its receipt by the agency. If such petition is not granted or denied within this time limit, the petition shall be deemed approved unless the time limit is waived by the petitioner.

(3) If the agency decides that the situation is not an emergency, the agency shall so notify the petitioner in writing, and the petition shall then be reviewed by the agency on a non-emergency basis as set forth in Section 120.542(7), F.S.

(4) The duration of an emergency variance or waiver shall be determined by the agency.

(5) The agency shall issue a written order granting or denying the petition. The order shall state the facts and reasons supporting the agency's action.

Rulemaking Authority 14.202, 120.54(5)(b)8. FS. Law Implemented 120.54(5)(b)8. FS. History—New 4-1-97, Amended 1-15-07, 12-24-07, 2-5-13.

28-104.0051 Revocation of Emergency or Temporary Variance or Waiver.

(1) Upon receipt of evidence sufficient to show that the recipient of an order granting an emergency or temporary variance or waiver is not in compliance with the requirements of that order, the agency shall issue an order to show cause why the emergency variance or waiver should not be revoked.

(2) The recipient of an emergency or temporary variance or waiver shall respond to the order to show cause why the emergency variance or waiver should not be revoked within 15 days of the mailing date of

the order to show cause. Failure to timely respond shall result in a final order revoking the emergency or temporary variance or waiver.

Rulemaking Authority 14.202, 120.54(5)(b)8. FS. Law Implemented 120.54(5)(b)8. FS. History--New 3-18-98.

28-104.006 Request for Information.

(1) When a person inquires of the agency about the possibility of relief from any rule requirements or the remedies available pursuant to Section 120.542, F.S., the agency shall provide the information required by Section 120.542(4), F.S., within 15 days of the inquiry.

(2) In its response to a request for information, the agency shall indicate the name, address and e-mail address of the appropriate contact person for additional information and shall indicate how a petition for variance or waiver is filed with the agency.

Rulemaking Authority 14.202, 120.54(5)(b)8. FS. Law Implemented 120.542(4) FS. History--New 4-1-97, Amended 2-5-13.

373.085 Use of works or land by other districts or private persons.--

(1) The governing board has authority 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. It is unlawful to connect with or make use of the works or land of the district without consent in writing from its governing board, and the board has authority to prevent or, if done, estop or terminate the same. The use of the works or land of the district for access is governed by this section and is not subject to the provisions of s. 704.01. However, any land or works of the district which have historically been used for public access to the ocean by means of the North New River Canal and its tributaries may not be closed for this purpose unless the district can demonstrate that significant harm to the resource would result from such public use.

(2) Damage resulting from unlawful use of such works, or from violations of the conditions of permit issued by the board shall, if made by other than a public agency, be subject to such penalty as is or may be prescribed by law and in addition thereto by a date and in a manner prescribed by the board, repair of said damage to the satisfaction of said board, or deposit with said board a sum sufficient therefor, and if by a public agency, then at the expense of such agency the repair of said damage to the satisfaction of the board or the deposit with said board of a sum sufficient therefor.

History.--s. 17, ch. 25209, 1949; s. 25, ch. 73-190; s. 1, ch. 82-46; s. 7, ch. 84-341; s. 25, ch. 88-242; ss. 1, 2, ch. 89-279; ss. 11, 12, ch. 90-217.

Note.--Former s. 378.17.