

**BEFORE THE ENVIRONMENTAL PROTECTION COMMISSION OF
HILLSBOROUGH COUNTY**

**In re: Southwest Florida Water Management District
Petition for Waiver**

Case No. LEPC07-006

**FINAL ORDER ON APPLICATION FOR CHAPTER 1-2 RULE OF THE
ENVIRONMENTAL PROTECTION COMMISSION WAIVER**

BACKGROUND

On February 14, 2007, the Southwest Florida Water Management District (SWFWMD) submitted a waiver request to the Environmental Protection Commission of Hillsborough County (EPC) under section 1-2.50, Rules of the EPC. SWFWMD requested a waiver of section 1-11.08(6)(e), Rules of the EPC. This rule requires a permanent conservation easement over any mitigation area in excess of 0.5 acres proposed as compensation for a permitted wetland impact..

Section 1-11.08(6) states in part

Where wetlands are or may be adversely impacted by development, an acceptable mitigation plan shall include detailed plans designed to compensate for any adverse impact to the environmental benefits and shall comply with Commission rules and Rules 62-345.200-.900, F.A.C. All such mitigation must also comply with the following:

e. a recorded designation in the Official Records of Hillsborough County as a permanent conservation easement as defined in section 704.06, F.S., whenever the mitigation area(s) alone or cumulatively exceed 0.5 acres.

SWFWMD requests a waiver of the above rule section for their proposed wetland impact based on the principles of fairness.

FINDINGS OF FACT

1. Applicant SWFWMD's wetland impacts are located within SWFWMD's Lower Hillsborough Flood Detention Area, which includes Flatwoods Wilderness Park. in Hillsborough County, Florida. The mailing address for SWFWMD is Office of General Counsel, 2379 Broad Street, Brooksville, Florida 34604-6899.

2. In accordance with Chapter 1-11, Rules of the EPC, the SWFWMD filed permit applications to impact wetlands for the Flatwoods Recreation Site Part II and Lower

Hillsborough Oak Ridge Wet Crossings Projects. Wetland impacts of 0.54 acres were permitted for trail and foot bridge construction. As part of the requirements to obtain a wetland permit, SWFWMD proposed 0.78 acres of on-site mitigation to offset adverse impacts to wetlands. Chapter 1-11 requires any mitigation in excess of 0.5 acres to be protected by a conservation easement in order to permanently protect the mitigation area.

3. The EPC received the waiver application on February 15, 2007, from SWFWMD. SWFWMD requested a waiver of section 1-11.08(6)(e), Rules of the EPC. This rule requires a permanent conservation easement for mitigation areas which alone or cumulatively exceed 0.50 acres in size proposed to offset wetlands impacts.

4. Pursuant to section 1-2.50(3), Rules of the EPC, SWFWMD published notice of the waiver application and the April 19th public hearing in the Tampa Tribune on Friday April 13, 2007.

5. Pursuant to section 1-2.50(4), the Commissioners considered the application, the Executive Director's recommendation, and the comments of the public at a regular meeting of the EPC on April 19, 2007.

6. SWFWMD stated that it qualifies for the waiver request because it will meet the underlying rule (Chapter 1-11) and that "a violation of the principles of fairness would occur" if the rule requirement was imposed.

7. SWFWMD asserts in its application that "the District [SWFWMD] is unique from others who are subject to EPC rules in that the District is a special district of the state created by the Legislature and charged with protecting and managing the water resources within its 16-county area. The property over which a conservation easement would be granted to EPC is already owned by the District and is managed for conservation purposes."

8. The area in question is also part of the District's Lower Hillsborough Flood Detention Area and is managed by SWFWMD for conservation purposes.

CONCLUSIONS OF LAW

9. This variance is requested pursuant to section 1-2.50, Rules of the EPC, which states as follows:

1-2.50 REQUEST FOR VARIANCE OR WAIVER

(a) Upon application, the Executive Director may recommend to the Commission that a variance or waiver be granted from the provisions of the rules adopted pursuant to Chapter 84-446, where the applicant demonstrates:

(1) A substantial hardship as defined by section 120.542, F.S., or that a violation of the principles of fairness as defined by section 120.542, F.S., would occur, and

(2) The purpose of the underlying rule can be, or has been, achieved by other means, and

(3) The provision from which the variance or waiver is being sought did not originate with the DEP where the variance must be considered

by the DEP pursuant to section 403.201, F.S. or the variance or waiver must be considered by the DEP or the Southwest Florida Water Management District pursuant to Chapter 120, F.S. Additionally, the Commission does not process variances or waivers of state-delegated rules.

(b) The application must specify the rule for which the variance or waiver is requested, the type of action requested, the specific facts that would justify a variance or waiver, and the reasons why and the manner by which the purposes of the underlying rule would still be met.

(c) Notice of the application must be published by the applicant in a newspaper of general circulation summarizing the factual basis for the application, the date of the Commission hearing, and information regarding how interested persons can review the application and provide comment.

(d) The Commission will consider the application, the Executive Director's recommendation, and the comments of the public at a public hearing during a Commission meeting. The Commission shall grant, in whole or part, or deny the application by written decision supported by competent substantial evidence. The Commission may impose additional conditions in a variance or waiver.

10. Section 1-2.50, Rules of the EPC, among other things, requires that the applicant show that "purpose of the underlying rule can be, or has been, achieved by other means" and "that a violation of the principles of fairness as defined by section 120.542, F.S., would occur." While section 120.542, F.S. is not the enabling legislation for the EPC variance provision, it is persuasive and the EPC adopted the statute's definitions for hardship and fairness. Section 120.542, F.S. provides that before an agency can grant a variance, the petitioner must demonstrate that the purpose of the underlying statute will be or has been achieved by other means and that either the application of the rule would create a substantial hardship or that it would violate principles of fairness. Section 120.542(2) states, "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."

11. Chapter 1-11, Rule of the EPC was established to avoid and/or minimize impacts to wetlands and to require that the environmental benefits provided by an impacted wetland are adequately protected through mitigation. Among other assertions, SWFWMD asserts that unlike the traditional private applicant for wetland impacts, SWFWMD is already statutorily charged in Chapter 373, F.S. with protecting lands in its ownership, thus it would be redundant and unfair to require a conservation easement over those same lands.

12. The Florida State Law Review, Winter 1997 (LEXSEE 24 FLA. ST. U.L. REV. 353. 361) explains the fairness exception as follows: "Fairness exceptions. These are 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." The law review article explains that the variance (or waiver) provision in Chapter 120, F.S. was created to acknowledge "that an agency's means of accomplishing a statutory directive may not be the only acceptable approach." SWFWMD asserts that requiring SWFWMD to encumber state

property designated for conservation purposes with a conservation easement is not a wise use of public resources and redundant, thus providing "minimal social benefit."

13. With the specific condition detailed below, SWFWMD has demonstrated that a violation of the principles of fairness would occur if they were not granted a waiver in this specific situation.

14. SWFWMD has demonstrated the underlying purpose of the rule will be achieved.

15. SWFWMD has demonstrated that the provision from which the waiver is being sought did not originate with the DEP where the variance must be considered by the DEP pursuant to section 403.201, F.S. and that the waiver does not need to be considered by the DEP or the SWFWMD pursuant to Chapter 120, F.S.

16. The following condition to this waiver applies to SWFWMD's subject application only and this order is enforceable under the EPC Act and rules: in the event SWFWMD ever conveys all or a portion of the aforementioned mitigation area, SWFWMD must then provide written notice to the EPC of the conveyance and SWFWMD must provide some alternative mitigation or protection which is acceptable to the EPC and equal to the mitigation or protection required by the EPC wetland permit.


ORDER

17. For the foregoing reasons, the requested waiver from sections 1-11.08(6)(e), Rules of the EPC is granted with the condition as noted above in paragraph 16.

NOTICE OF RIGHTS

The EPC's proposed action on this waiver shall become final unless a timely appeal via writ of *certiorari* to the 13th Judicial Circuit is filed with any appropriate fee. A copy of the appeal must be provided to the EPC Legal Department, 3629 Queen Palm Dr., Tampa, Florida 33619.

DONE AND ORDERED this 25th of April, 2007 in Tampa, Florida.



Brian Blain
EPC Chairman

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