

MEMORANDUM

TO: Governing Board Members

FROM: Deena Reppen, Deputy Executive Director, Regulatory & Public Affairs

DATE: August 31, 2009

SUBJECT: Adopt amendments to Rules 40E-4.021 and 40E-4.091, F.A.C., and the Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District (Basis of Review) to implement changes in the listing status of the bald eagle consistent with the Florida Fish and Wildlife Conservation Commission (FFWCC) listing, address secondary impacts to the functions of Bald Eagle nesting habitat, and to update rule citations into the District's rules in coordination with the other water management districts and the Florida Department of Environmental Protection (FDEP).

Staff Recommendation

Staff recommends adoption of the amendments to Rules 40E-4.021 and 40E-4.091, F.A.C., and the Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District (Basis of Review) to implement changes in the listing status of the bald eagle consistent with the FFWCC listing, to address secondary impacts to the functions of Bald Eagle nesting habitat, and to update rule citations into the District's rules in coordination with the other water management districts and FDEP.

Background

Pursuant to Rule 68A-27.0012, F.A.C, on April 9, 2008, the Florida Fish and Wildlife Conservation Commission (FFWCC) adopted a Bald Eagle Management Plan as part of the process for removing the bald eagle from the State of Florida's list of threatened species. The FFWCC has determined that the bald eagle should be removed as a listed species since (1) bald eagles occur throughout the state; (2) the population does not experience extreme fluctuations in distribution or numbers; (3) the estimated number of adults has increased more than 300% during the past three eagle generations; and (4) the population is not projected to experience significant declines over the next three eagle generations. As a result, the FFWCC has finalized the delisting of the bald eagle through its April 2008 rule adoption. The bald eagle appears in District's Table of Listed Species. This rulemaking is necessary, in part, to remove the bald eagle from that table.

The FFWCC has continued to provide protection to the Bald Eagle through the adoption of a permitting program in Rule 68A-16.002, F.A.C. Additionally, the FWC has adopted Bald Eagle Management Guidelines which have been incorporated into Rule 68A-16.002, F.A.C. The provisions of the approved state management plans are also consistent with the recently adopted federal rules regarding delisting of bald eagles as well as the currently approved management plans for protection of bald eagles.

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Revisions to District rules also continue to provide protection to the functions of wetlands or uplands utilized for nesting by the Bald Eagle. In order for an applicant to demonstrate that there will not be adverse secondary impacts to wetlands or uplands used for nesting by the Bald eagle, applicants may provide documentation that they hold a valid permit or authorization pursuant to Rule 68A-16.002, F.A.C., or documentation of compliance with FWC Eagle Management Guidelines. The proposed rule modifications are being proposed in coordination with the other water management districts and the Department of Environmental Protection.

Staff recommends that the Governing Board adopt amendments to Rules 40E-4.021 and 40E-4.091, F.A.C., and the Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District (Basis of Review) to implement changes in the listing status of the bald eagle consistent with the Florida Fish and Wildlife Conservation Commission (FFWCC) listing, to address secondary impacts to the functions of Bald Eagle nesting habitat, and to update rule citations into the District's rules in coordination with the other water management districts and the Florida Department of Environmental Protection (FDEP).

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40E-4.021 Definitions.

When used in this chapter, Chapters 40E-40, 40E-41, and 40E-400, F.A.C.,

(1) through (28) No change.

(29) “Listed species” means those animal species which are endangered, threatened or of special concern and are listed in Rules 68A-27.003 (as amended December 16, 2003), 68A-27.004 (as amended May 15, 2008), and 68A-27.005 (as amended November 8, 2007), F.A.C., and those plant species listed in 50 Code of Federal Regulation 17.12 (as amended April 8, 2004), when such plants are found to be located in a wetland or other surface water.

(30) through (46) No change.

Rulemaking Specific Authority 373.044, 373.113, 668.003, 668.004, 668.50 FS. Law Implemented 373.019, 373.403-.443, 403.031, 668.003, 668.004, 668.50, 704.06 FS. History–New 9-3-81, Amended 1-31-82, 12-1-82, Formerly 16K-1.05(1), Amended 7-1-86, 4-20-94, 10-3-95, 4-1-96, 10-1-06,_____.

40E-4.091 Publications, Rules and Interagency Agreements Incorporated by Reference.

(1) The following publications, rules and interagency agreements are incorporated by reference into this chapter, Chapters 40E-40, 40E-41 and 40E-400, F.A.C.:

(a) “Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District – _____7-22-07”.

(b) through (k) No change.

(2) No change.

Rulemaking Specific Authority 373.044, 373.103(8), 373.113, 373.171, 373.413, 373.441, 668.003, 668.004, 668.50, 704.06 FS. Law Implemented 373.413, 373.4135, 373.4137, 373.414, 373.4142, 373.416, 373.418, 373.421, 373.426, 373.441, 668.003, 668.004, 668.50, 704.06 FS. History–New 9-3-81 Amended 1-31-82, 12-1-82, Formerly 16K-4.035(1), Amended 5-1-86, 7-1-86, 3-24-87, 4-14-87, 4-21-88, 11-21-89, 11-15-92, 1-23-94, 4-20-94, 10-3-95, 1-7-97, 12-3-98, 5-28-00, 8-16-00, 1-17-01, 7-19-01, 6-26-02, 6-26-02, 4-6-03, 4-14-03, 9-16-03, 12-7-04, 2-12-06, 10-1-06, 11-20-06, 1-23-07, 7-1-07, 7-22-07,_____.

BASIS OF REVIEW FOR ENVIRONMENTAL RESOURCES PERMIT APPLICATIONS WITHIN SOUTH FLORIDA WATER MANAGEMENT DISTRICT

2.0 Definitions

2.1 through 2.9 No change.

2.10 “Endangered Species” – Those animal species which are listed in Section 68A-27.003 (as amended December 16, 2003), ~~39-27.003~~, F.A.C., and those plant species which are listed as endangered in 50 Code of Federal Regulations 17.12 (as amended April 8, 2004), when such plants are found to be located in a wetland or other surface water.

2.11 through 2.17 No change.

2.18 “Listed species” – Those animals species which are endangered, threatened or of special concern and are listed in Sections 68A-27.003 (as amended December 16, 2003), 68A-27.004 (as amended May 15, 2008), and 68A-27.005 (as amended November 8, 2007) ~~39-27.003, 39-27.004 and 39-27.005~~, F.A.C., and those plant species listed in 50 Code of Federal Regulation 17.12 (as amended April 8, 2004), when such plants are found to be located in a wetland or other surface water.

2.19 through 2.36 No change.

2.37 “Threatened Species” – Those animal species listed in Section 68A-27.004 (as amended May 15, 2008), ~~39-27.004~~, F.A.C., and those plant species which are listed as threatened in 50 Code of Federal Regulations 17.12 (as amended April 8, 2004), when such plants are found to be located in a wetland or other surface water.

2.38 through 2.39 No change.

4.2.7 Secondary Impacts

Pursuant to paragraph 4.1.1(f), an applicant must provide reasonable assurances that a regulated activity will not cause adverse secondary impacts to the water resource, as described in paragraphs (a) through (d) below. Aquatic or wetland dependent fish and wildlife are an integral part of the water resources which the District is authorized to protect under Part IV, Chapter 373, F.S. Those aquatic or wetland dependent species which are listed as threatened, endangered or of special concern and the Bald Eagle (*Haliaeetus leucocephalus*), which is protected under the Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d), are particularly in need of protection.

A proposed system shall be reviewed under this criterion by evaluating the impacts to: wetland and surface water functions identified in subsection 4.2.2.2.

water quality; upland habitat for Bald Eagles (*Haliaeetus leucocephalus*), aquatic or wetland dependent listed species; and historical and archaeological resources. De minimis or remotely related secondary impacts will not be considered. Applicants may propose measures such as preservation to prevent secondary impacts. Such preservation shall comply with the land preservation provisions of subsection 4.3.8. If such secondary impacts can not be prevented, the applicant may propose mitigation measures as provided for in subsections 4.3 – 4.3.9. This secondary impact criterion consists of the following four parts:

(a) An applicant shall provide reasonable assurance that the secondary impacts from construction, alteration, and intended or reasonably expected uses of a proposed system will not cause violations of water quality standards or adverse impacts to the functions of wetlands or other surface waters, as described in subsection 4.2.2. Impacts such as boat traffic generated by a proposed dock, boat ramp or dry dock facility, which causes an increased threat of collision with manatees; impacts to wildlife from vehicles using proposed roads in wetlands or surface waters; impacts to water quality associated with the use of septic tanks or propeller dredging by boats and wakes from boats; and impacts associated with docking facilities as described in paragraphs 4.2.4.3(f) and (h), will be considered relative to the specific activities proposed and the potential for such impacts. Impacts of groundwater withdrawals upon wetlands and other surface waters that result from the use of wells permitted pursuant to Chapters 40E-2 and 40E-3, F.A.C., shall not be considered under rules adopted pursuant to Part IV, Chapter 373, F.S., since these impacts are considered in the consumptive use permit application process.

Secondary impacts to the habitat functions of wetlands associated with adjacent upland activities will not be considered adverse if buffers, with a minimum width of 15' and an average width of 25', are provided abutting those wetlands that will remain under the permitted design, unless additional measures are needed for protection of wetlands used by Bald Eagle (*Haliaeetus leucocephalus*) for nesting or listed species for nesting, denning, or critically important feeding habitat. The mere fact that a species is listed does not imply that all of its feeding habitat is critically important. Buffers shall remain in an undisturbed condition, except for drainage features such as spreader swales and discharge structures, provided the construction or use of these features does not adversely impact wetlands. Where an applicant elects

not to utilize buffers of the above described dimensions, buffers of different dimensions, measures other than buffers or information may be proposed to provide the required reasonable assurance.

De_minimis or remotely related secondary impacts such as changes in air quality due to increased vehicular traffic associated with road construction will not be considered unacceptable.

(b) An applicant shall provide reasonable assurance that the construction, alteration, and intended or reasonably expected uses of a proposed system will not adversely impact the ecological value of uplands to Bald Eagles (*Haliaeetus leucocephalus*) and aquatic or wetland dependent listed animal species for enabling existing nesting or denning by these species, but not including:

1. areas needed for foraging; or
2. wildlife corridors, except for those limited areas of uplands necessary for ingress and egress to the nest or den site from the wetlands or other surface water.

Table 4.2.7-1 identifies those aquatic or wetland dependent listed species that use upland habitats for nesting and denning.

For those aquatic or wetland dependent listed animal species for which habitat management guidelines have been developed by the U.S. Fish and Wildlife Service (USFWS) or the Florida Fish and Wildlife Conservation Commission (FWC) ~~Florida Game and Fresh Water Fish Commission (FGFWFC)~~, compliance with these guidelines will provide reasonable assurance that the proposed system will not adversely impact upland habitat functions described in paragraph (b). For those aquatic or wetland dependent listed animal species for which habitat management guidelines have not been developed or in cases where an applicant does not propose to use USFWS or FWC ~~FGFWFC~~ habitat management guidelines, the applicant may propose measures to mitigate adverse impacts to upland habitat functions described in paragraph (b) provided to aquatic or wetland dependent listed animal species. Secondary impacts to the functions of wetlands or uplands for nesting of Bald Eagles (*Haliaeetus leucocephalus*) will not be considered adverse if the applicant holds a valid permit pursuant to Rule 68A-16.002(1)(a), F.A.C. (May 15, 2008) or a valid authorization as described in Rule 68A-16.002(1)(c), F.A.C. (May 15, 2008) for the same activities proposed by the applicant under Part IV of Chapter 373, F.S., or if the applicant demonstrates

compliance with the FWC Eagle Management Guidelines incorporated by reference in Rule 68A-16.002, F.A.C. (May 15, 2008).

(c) through (d) No change.

TABLE 4.2.7-1

Listed Wildlife Species That Are Aquatic Or Wetland Dependent
And That Use Upland Habitats For Nesting Or Denning

Fishes

Species of Special Concern

No change.

Reptiles

Endangered

No change.

Threatened

No change.

Species of Special Concern

No change.

Birds

Endangered

No change.

Threatened

Charadrius alexandrinus tenuirostris (southeastern snowy plover)

Charadrius melodus (piping plover)

Columba leucocephalus (white-crowned pigeon)

Grus canadensis pratensis (Florida sandhill crane)

~~Haliaeetus leucocephala (bald eagle)~~

Picoides borealis (red-cockaded woodpecker) THIS SPECIES IS WETLAND
DEPENDENT ONLY IN LEE, COLLIER, AND CHARLOTTE COUNTIES

Polyborus plancus audubonii (Audubon's crested caracara)

Sterna antillarum (least tern)

Sterna dougallii (roseate tern)

Species of Special Concern

No change.

Mammals

Endangered

No change.

Threatened

No change.

Species of Special Concern

No change.

4.3.1.5 To offset adverse secondary impacts from regulated activities to habitat functions that uplands provide to Bald Eagles (*Haliaeetus leucocephalus*) for nesting and to listed species evaluated as provided in paragraph 4.2.7(b), mitigation can include the implementation of management plans, participation in a wildlife mitigation park establish by the FWC ~~FGFWFC~~, or other measures. Measures to offset adverse secondary impacts on wetlands and other surface waters resulting from use of a system can include the incorporation of culverts or bridged crossings designed to facilitate wildlife movement, fencing to limit access, reduced speed zones, or other measures designed to offset the secondary impact.