

MEMORANDUM

TO: Governing Board Members

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

DATE: November 6, 2009

SUBJECT: **Authorize publication of the Notice of Rulemaking in the Florida Administrative Weekly (FAW) to amend Rules 40E-1.659, F.A.C., and 40E-4.091, F.A.C., to incorporate a conservation easement for local government.**

Recommendation

Staff recommends approval of the publication of the Notice of Rulemaking to incorporate a conservation easement for local governments.

Background

During the review of Environmental Resource Permits, local government agencies sometimes propose to impact wetlands through filling, dredging or other methods and often propose to preserve, enhance or restore other wetlands or uplands as mitigation for those impacts. In addition, local governments sometimes enter into agreements with third parties to conduct site specific mitigation on the local government agency's property. Pursuant to Section 704.06, Fla. Stat., to provide reasonable assurance that certain areas will not be subject to future impacts and that the proposed mitigation areas will be legally protected, a conservation easement is usually placed over the mitigation or preservation area.

In January 2007, the District adopted rules to incorporate several types of standardized easement forms for use by private property owners. The use of the standardized forms reduces expenses for applicants and reduces review time by the District because if a standard form is utilized, individual legal review of the form is not necessary.

However, the currently approved forms cannot be used by local governments due to certain language in those forms that does not apply to government entities. Chapter 40E-1.659, F.A.C., includes all the forms and instructions incorporated by reference into the District's rules. District staff recommends that the rule be amended to incorporate a conservation easement form for local governments.

Applicants may still propose language to address site specific characteristics. The existing rule language explicitly states that when an applicant demonstrates that project specific conditions necessitate deviation from language of the accepted forms, alternative language shall be accepted provided that the intent of Section 704.06, F.S. and Section 4.3.8 of the Basis of review are met.

Staff Contact: **Anita Bain, Director, Director, Environmental Resource Permitting Division
(561) 682-6866**

**Susan Martin, Sr. Specialist Attorney, Office of Counsel
(561) 682-6251**

DEED OF CONSERVATION EASEMENT

Return recorded document to:
South Florida Water Management District
3301 Gun Club Road, MSC 4210
West Palm Beach, FL 33406

THIS DEED OF CONSERVATION EASEMENT is given this _____ day of _____, 20____, by _____, a political subdivision of the State of Florida, _____ ("Grantor") whose mailing address is _____ to the South Florida Water Management District ("Grantee"). As used herein, the term "Grantor" shall include any and all successors or assigns of the Grantor, and all subsequent owners of the "Property" (as hereinafter defined) and the term "Grantee" shall include any successor or assignee of Grantee.

WITNESSETH

WHEREAS, the Grantor is the owner of certain lands situated in _____ County, Florida, and more specifically described in Exhibit "A" attached hereto and incorporated herein ("Property"); and

WHEREAS, the Grantor desires to construct _____ ("Project") at a site in _____ County, which is subject to the regulatory jurisdiction of South Florida Water Management District ("District"); and

WHEREAS, District Permit No. _____ ("Permit") authorizes certain activities which affect surface waters in or of the State of Florida; and

WHEREAS, this Permit requires that the Grantor preserve, enhance, restore and/or mitigate wetlands and/or uplands under the District's jurisdiction; and

WHEREAS, the Grantor has developed and proposed as part of the Permit conditions, a conservation tract and maintenance buffer involving preservation of certain wetland and/or upland systems on the Property; and

WHEREAS, the Grantor, in consideration of the consent granted by the Permit, is agreeable to granting and securing to the Grantee a perpetual Conservation Easement

Form No. 1318, Revised ___/20__

Deed of Conservation Easement – Local Governments, Incorporated by reference in Rules 40E-1.659, F.A.C., and Section 4.3.8, Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District, incorporated by reference in Rule 40E-4.091, F.A.C.

as defined in Section 704.06, Florida Statutes, over the area described on Exhibit "A" ("Conservation Easement").

NOW, THEREFORE, in consideration of the issuance of the Permit to construct and operate the permitted activity, and as an inducement to Grantee in issuing the Permit, together with other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, Grantor hereby grants, creates, and establishes a perpetual Conservation Easement for and in favor of the Grantee upon the Property described on Exhibit "A" which shall run with the land and be binding upon the Grantor, and shall remain in full force and effect forever.

The scope, nature, and character of this Conservation Easement shall be as follows:

1. Recitals. The recitals hereinabove set forth are true and correct and are hereby incorporated into and made a part of this Conservation Easement.

2. Purpose. It is the purpose of this Conservation Easement to retain land or water areas in their natural, vegetative, hydrologic, scenic, open, agricultural or wooded condition and to retain such areas as suitable habitat for fish, plants or wildlife. Those wetland and/or upland areas included in the Conservation Easement which are to be preserved, enhanced or created pursuant to the Permit shall be retained and maintained in the enhanced or created conditions required by the Permit.

To carry out this purpose, the following rights are conveyed to Grantee by this easement:

a. To enter upon the Property at reasonable times with any necessary equipment or vehicles to enforce the rights herein granted in a manner that will not unreasonably interfere with the use and quiet enjoyment of the Property by Grantor at the time of such entry; and

b. To enjoin any activity on or use of the Property that is inconsistent with this Conservation Easement and to enforce the restoration of such areas or features of the Conservation Easement that may be damaged by any inconsistent activity or use.

3. Prohibited Uses. Except for restoration, creation, enhancement, maintenance and monitoring activities, or surface water management improvements, or other activities described herein that are permitted or required by the Permit, the following activities are prohibited in or on the Conservation Easement:

- a. Construction or placing of buildings, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground;
- b. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste, or unsightly or offensive materials;
- c. Removal or destruction of trees, shrubs, or other vegetation, except for the removal of exotic or nuisance vegetation in accordance with a District approved maintenance plan;
- d. Excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance in such manner as to affect the surface;
- e. Surface use except for purposes that permit the land or water area to remain in its natural or enhanced condition;
- f. Activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat preservation including, but not limited to, ditching, diking and fencing;
- g. Acts or uses detrimental to such aforementioned retention of land or water areas;
- h. Acts or uses which are detrimental to the preservation of the structural integrity or physical appearance of sites or properties having historical, archaeological, or cultural significance.

4. Passive Recreational Facilities. Grantor reserves all rights as owner of the Property, including the right to engage in uses of the Property that are not prohibited herein and that are not inconsistent with any District rule, criteria, the Permit and the intent and purposes of this Conservation Easement. Passive recreational uses that are not contrary to the purpose of this Conservation Easement may be permitted upon written approval by the District. Without limiting the generality of the foregoing, the following rights are expressly reserved:

- a. The Grantor may conduct limited land clearing for the purpose of constructing such pervious facilities as docks, boardwalks or mulched walking trails; and
- b. The Grantor may construct and maintain passive public use facilities for the purpose of educating the public or allowing public access and recreation which have minimal or no impact on natural resources; and

c. Grantor may place signs and markers as necessary to identify trails, restoration areas, or other site features related to public use and land management activities; and

d. Grantor may construct and maintain to the extent allowed by current and future permits, at grade, management roads, fire breaks, trails, walkways, piers, observation platforms or boardwalks necessary to provide public access and management activities as provided for in the site's management plan; and

e. Grantor may remove or kill by any lawful means, exotic or nuisance vegetation or animal species, conduct prescribed burns and conduct other management activities necessary to carry out management for conservation purposes; and

f. Grantor may conduct restoration and enhancement projects which do not conflict with the purpose of this easement; and

g. The construction and use of the approved passive recreational facilities shall be subject to the following conditions:

i. Grantor shall minimize and avoid, to the fullest extent possible, impact to any wetland or upland buffer areas within the Conservation Easement Area and shall avoid materially diverting the direction of the natural surface water flow in such area;

ii. Such facilities and improvements shall be constructed and maintained utilizing Best Management Practices;

iii. Adequate containers for litter disposal shall be situated adjacent to such facilities and improvements and periodic inspections shall be instituted by the maintenance entity, to clean any litter from the area surrounding the facilities and improvements;

iv. This Conservation Easement shall not constitute permit authorization for the construction and operation of the passive recreational facilities. Any such work shall be subject to all applicable federal, state, District or local permitting requirements.

5. No Dedication. No right of access by the general public to any portion of the Property is conveyed by this Conservation Easement.

6. Grantee's Liability. Grantee shall not be responsible for any costs or liabilities related to the operation, upkeep or maintenance of the Property.

7. Property Assessments. If and to the extent that the Grantor is not exempt from assessments and assessments are levied against the Easement Parcel, Grantor shall keep the assessments on the Easement Parcel current.

8. Enforcement. Enforcement of the terms, provisions and restrictions of this Conservation Easement shall be at the reasonable discretion of Grantee, and any forbearance on behalf of Grantee to exercise its rights hereunder in the event of any breach hereof by Grantor, shall not be deemed or construed to be a waiver of Grantee's rights hereunder.

9. Assignment. Grantee will hold this Conservation Easement exclusively for conservation purposes. Grantee will not assign its rights and obligations under this Conservation Easement except to another organization or entity qualified to hold such interests under the applicable state laws.

10. Severability. If any provision of this Conservation Easement or the application thereof to any person or circumstances is found to be invalid, the remainder of the provisions of this Conservation Easement shall not be affected thereby, as long as the purpose of the Conservation Easement is preserved.

11. Terms, Conditions, Restrictions, Purpose. The terms, conditions, restrictions and purpose of this Conservation Easement shall be referenced by Official Record Book and Page Number by Grantor in any subsequent deed or other legal instrument by which Grantor divests itself of any interest in the Conservation Easement. Any future holder of the Grantor's interest in the Property shall be notified in writing by Grantor of this Conservation Easement.

12. Written Notice. All notices, consents, approvals or other communications hereunder shall be in writing and shall be deemed properly given if sent by United States certified mail, return receipt requested, addressed to the appropriate party or successor-in-interest.

13. Modifications. This Conservation Easement may be amended, altered, released or revoked only by written agreement between the parties hereto or their heirs, assigns or successors-in-interest, which shall be filed in the public records in _____ County.

TO HAVE AND TO HOLD unto Grantee forever. The covenants, terms, conditions, restrictions and purposes imposed with this Conservation Easement shall be binding upon Grantor, and shall continue as a servitude running in perpetuity with the Property.

The Grantor agrees to defend the title to the Conservation Easement property hereby conveyed against the lawful claims of all persons claiming by, through, or under the Grantor, except those claims created or arising from any act or omission of Grantee.

IN WITNESS WHEREOF,

(Grantor) has hereunto set its authorized hand this _____
day of _____, 20_____.

A political subdivision of the State of Florida

By: _____

(Print Name and Title)

ATTEST:

BY: _____
Deputy Clerk

DATE: _____

APPROVED AS TO FORM AND
SUFFICIENCY

By: _____

(Print Name and Title)

EXHIBIT A

[DESCRIPTION OF PROPERTY]

Form No. 1318, Revised __/20__

Deed of Conservation Easement – Local Governments, Incorporated by reference in Rules 40E-1.659, F.A.C., and Section 4.3.8, Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District, incorporated by reference in Rule 40E-4.091, F.A.C.

THE FULL TEXT OF THE PROPOSED RULE IS:

40E-1.659 Forms and Instructions.

The following forms and instructions are hereby incorporated by reference in this chapter and may be obtained without cost by contacting the Records Management Specialist, South Florida Water Management District, 3301 Gun Club Road, West Palm Beach, FL 33406, (800)432-8045, ext. 6436, or (561)682-6436 or at any of the District’s Service Centers. Locations and contacts for the District’s Service Centers may be obtained from the Records Management Specialist at the address and phone number provided herein or on the District’s website at <http://www.sfwmd.gov>. These forms may also be obtained from the District’s website at <http://www.sfwmd.gov>, “What We Do”, then “Permitting/Regulation”. On the “Permitting/Regulation” page, click on “Environmental Resource Permits” then “Forms”:

Form No.	Date	Title
0050A	7-89	Application to the South Florida Water Management District for a Permit for Utilization of District Works or Modification of Existing Permit Works of the District No.
0108	3-91	Application for Release of Mineral, Canal, and Road Reservations Reserved Under Chapters 6456, 6957, 7305, 9131, 14717 and 20658, Laws of Florida
0113	8-95	Surface Water Management Permit No.
0115	8-95	Surface Water Management Permit Modification No.
0119	8-95	Wetland Resource Permit No.
0122	4-93	Application to the South Florida Water Management District for Authority to Utilize Works or Land of the District
0123	4-95	Well Construction Permit Application
0124	11-90	Well Completion Report
0145	8-95	Environmental Resource Permit No.
0157	8-95	Environmental Resource Permit Modification No.
0188-QMQ	8-03	Quarterly Report of Withdrawals
0188-MDQ	8-03	Monthly Report of Daily Withdrawals
0188-QASR	8-03	Quarterly Report of Injections and Withdrawals for Aquifer Storage and Recovery (ASR) Wells
0188-QMON	8-03	Quarterly Report of Monitoring Requirements
0188-QMQF	8-03	Quarterly Report of Withdrawals from Wells and Surface Water Pumps
0188-QCROP	8-03	Report of Planting and Harvest of Seasonal Crops
0188-QBWDR	8-03	Quarterly Report of Bulk Water Delivered and Received
0195	6-91	Public Water Supply Well Information and Classification
0196	10-89	Water Well Inspection Scheduling Card
0299	1-90	Water Use Permit No.
0444	8-95	Application for a Standard General Permit for Incidental Site Activities
0445	8-03	Mining/Dewatering Permit Application (RC-1A, RC-1W, RC-1G)
0483	9-04	Request for Environmental Resource, Surface Water Management, Water Use or Wetland Resource Permit Transfer
0645-W01	8-03	Water Use Permit Application (RC-1A, RC-1W, RC-1G)
0645-G60	8-03	Table A Descriptions of Wells
0645-G61-1	8-03	Table B Description of Surface Water Pumps
0645-G61-2	8-03	Table C Description of Culverts
0645-G65	8-03	Table D Crop Information
0645-G74	8-03	Table E Water Received From or Distributed to Other Entities
0645-G69	8-03	Table F Past Water Use & Table G Projected Water Use
0645-G70	8-03	Table H Projected Water Use (For Per Capita Greater than 200 GPD)
0645-G71	8-03	Table I Water Treatment Method and Losses
0645-G72	8-03	Table J Aquifer Storage and Recovery
0645-G73	8-03	Table K Water Supply System Interconnections
0779	5-92	Guidance for Preparing an Application for a “Works of the District” Permit in the Everglades/ Application for a Works of the District Permit

0830	4-94	Special Use Application and License
0881A	9-03	Environmental Resource/Surface Water Management Permit Construction Completion Certification
0881B	9-03	Environmental Resource/Surface Water Management Permit Construction Completion Certification-For Projects Permitted Prior to October 3, 1995
0889	9-04	Certification of Waiver of Permit Application Processing Fee
0920	9-04	Request for Conversion of District Environmental Resource/Surface Water Management Permit from Construction Phase to Operation Phase and Transfer of Permit to the Operating Entity
0941	8-95	Environmental Resource Standard/Noticed General Permit No.
0942	8-95	Surface Water Management General Permit No.
0960	9-04	Environmental Resource/Surface Water Management Permit Construction Commencement Notice
0961	9-04	Environmental Resource/Surface Water Management Permit Annual Status Report for Surface Water Management System Construction
0970	8-07	Applicant Transmittal Form for Requested Additional Information
0971	8-07	Joint Application for Environmental Resource Permit/Authorization to Use State Owned Submerged Lands/Federal Dredge and Fill Permit
0972	8-95	Petition for a Formal Wetland and Surface Water Determination
0973	8-95	Above Ground Impoundment Inspection/Certification Report
0974	8-95	Notice of Intent to Construct a Minor Silvicultural System
0980	8-95	Notice of Intent to Use a Noticed General Environmental Resource Permit
1019	9-04	Mitigation Bank Performance Bond to Demonstrate Construction/Implementation Financial Assurance
1020	9-04	Mitigation Bank Irrevocable Letter of Credit to Demonstrate Construction/Implementation Financial Assurance
1021	9-04	Mitigation Bank Standby Trust Fund Agreement to Demonstrate Construction/Implementation Financial Assurance
1022	9-04	Mitigation Bank Trust Fund Agreement to Demonstrate Construction/Implementation Financial Assurance
1023	9-04	Mitigation Bank Trust Fund Agreement to Demonstrate Perpetual Management Financial Assurance
1024	9-04	Mitigation Bank Standby Trust Fund Agreement to Demonstrate Perpetual Management Financial Assurance
1105	6-02	Performance Bond to Demonstrate Financial Assurance
1106	6-02	Irrevocable Letter of Credit to Demonstrate Financial Assurance
1109	8-03	Water Use General Permit
1189	2-06	Notice of Environmental Resource or Surface Water Management Permit
1190	1-07	Deed of Conservation Easement (Standard)
1191	1-07	Deed of Conservation Easement (Standard Passive Recreational)
1192	1-07	Deed of Conservation Easement (Standard Riparian)
1194	1-07	Deed of Conservation Easement (Third Party Standard)
1195	1-07	Deed of Conservation Easement (Third Party Passive Recreational)
1196	1-07	Deed of Conservation Easement (Third Party Riparian)
1197	1-07	Restrictive Covenant (Standard)
1318	_____	<u>Deed of Conservation Easement (Local Governments)</u>

Rulemaking Specific Authority 120.53, 218.075, 373.044, 373.113, 373.4136, 373.416, , 704.06 FS.

Law Implemented 120.53, 218.075, 373.113, 373.4135, 373.4136, 373.416, 704.06 FS. History–New 9-3-81, Amended 12-1-82, 3-9-83, Formerly 16K-1.90, Amended 7-26-87, 11-21-89, 1-4-93, Formerly 40E-1.901, Amended 5-11-93, 4-20-94, 10-3-95, 6-26-02, 8-14-02, 8-31-03, 9-16-03, 9-20-04, 2-12-06, 1-23-07, 8-7-07, _____ .

THE FULL TEXT OF THE PROPOSED RULE IS:

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 – ~~11-11-09~~”.

(b) through (k) No Change.

(2) No Change.

Rulemaking 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, ____.

(The following represents proposed changes to the document entitled “Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District - 11-11-09” incorporated by reference in Rule 40E-4.091, F.A.C.)

4.3.8 Real Property Conveyances

(a) and (b) No Change

(c) The use of Form No(s) 1190-1192, ~~and 1194-1197, and 1318, incorporated by reference~~ ~~referenced~~ in Rule 40E-1.659, F.A.C., shall constitute consistency with Section 704.06, F.S. Where the applicant demonstrates that project specific conditions necessitate deviation from language of the accepted forms, alternative language shall be accepted provided that the intent of Section 704.06, F.S., and Section 4.3.8 of the Basis of Review for Environmental Resource Permit Applications Within the South Florida Water Management District are met.

(d) No Change.