

## Notice of Proposed Rule

### WATER MANAGEMENT DISTRICTS South Florida Water Management District

#### RULE NO: RULE TITLE

[40E-4.021](#): Definitions

[40E-4.091](#): Publications, Rules and Interagency Agreements Incorporated by Reference

**PURPOSE AND EFFECT:** The purpose and effect of the proposed rule amendments is to: (1) reflect that the Bald Eagle is no longer classified by the Florida Fish and Wildlife Conservation Commission (FWC) as a threatened species under its imperiled species regulations; (2) continue to provide to the Bald Eagle (which is still protected under a federal statute known as the Bald and Golden Eagle Protection Act) protections afforded by the District's rules to wildlife species as classified by FWC as endangered, threatened, or species of special concern; and (3) update rule references to listed wildlife and plants in the definitions of "listed species", "endangered species" and "threatened species." The District proposes to amend Table 4.2.7-1 of the "Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District" (Basis of Review) to remove the Bald Eagle from the category of threatened species and to amend section 4.2.7 to refer to the Bald Eagle so that its existing nesting habitat in uplands would continue to be protected under the District's rules. The amendments also provide that secondary cumulative impacts to the functions of wetlands or uplands for nesting of Bald Eagles will not be considered adverse if a valid permit under Rule 68A-16.002, F.A.C., has been issued to a permit applicant by the FWC for the same activities the applicant is proposing under Part IV of Chapter 373, F.S., or if the applicant demonstrates compliance with the FWC Eagle Management Guidelines that were adopted by the FWC and became effective May 15, 2008.

**SUMMARY:** The proposed rules address the change in classification of the Bald Eagle in the FWC's imperiled species regulations. The proposed rules amend Sections 2.0, 4.2.7, and 4.3.1.5 of the Basis of Review, and Rule 40E-4.091, F.A.C., which incorporates these sections by reference. In addition, the proposed rules update the definitions of listed species, endangered species and threatened species by amending subsection 40E-4.021(2), F.A.C., and subsections 2.10, 2.18 and 2.37 of the Basis of Review.

**SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS:** The District is proposing continued protection of the Bald Eagle under the secondary impacts provision of the Basis of Review. In addition, the District is proposing to revise and add an option to the actions that can be taken to avoid adverse secondary impacts related to Bald Eagles and their habitat. Previously, an applicant whose proposed activities could cause secondary impacts could either propose mitigation to the District in accordance with section 4.3.1.5 of the Basis of Review (unchanged) or follow the U.S. Fish and Wildlife Habitat Management Guidelines for the Bald Eagle in the Southeast Region (Third Revision, January 1987). The proposed revisions continue to allow the proposal of mitigation for adverse secondary impacts. The second option is to follow the guidelines in the FWC Bald Eagle Management Plan (April 9, 2008). The third, additional option is to obtain a Bald Eagle permit from the FWC if either mitigation is not proposed to the District or the FWC Bald Eagle Management Plan guidelines are not followed.

The proposed revisions should pose no significant negative impacts to permit applicants as the mitigation provisions remain unchanged, previous authorizations for proposed activities are recognized, the FWC Bald Eagle Management Plan guidelines are significantly less restrictive than the previous U.S. Fish and Wildlife habitat management guidelines (based on the findings of years of monitoring of development activities on Bald Eagles), and the permit applicant may obtain an FWC permit when it is more advantageous than the other two options.

Both Environmental Resource Permit (ERP) holders and applicants may be affected by the proposed rule.

Applicants will be affected if they seek to obtain an ERP to develop a parcel hosting a Bald Eagle nest. Existing

permittees will be affected if they seek to revise their ERP in order to develop or redevelop a parcel hosting a Bald Eagle nest.

There has not been a significant amount of ERP permitting activity on sites hosting Bald Eagle nests. Annually, since 2003, the District has issued around 12.5 permits with Bald Eagle nests (less than 1% of total). No significant increases are expected.

The proposed revisions are not expected to pose any additional implementation, monitoring or enforcement costs to the District or any other state or local governments.

Transactional costs associated with the District mitigation activities to protect Bald Eagles and their habitat from adverse impacts could include costs associated with:

- 1) loss of revenue associated with reduction of developable or seasonally usable area due to required buffer zones, setbacks or conservation easements (and the costs of establishing such easements);
- 2) the loss of revenue due to changes in the type or optimal arrangement of development and associated activities;
- 3) loss of revenue and/or increases in financing or development costs due to delays caused by restrictions on certain development or ongoing activities during nesting season;
- 4) monitoring and reporting, or
- 5) monetary or in-kind contributions to wildlife mitigation parks.

These provisions are not changed. To some extent, the above costs may be offset by the additional value conveyed to land adjacent to preserved natural areas.

Transactional costs (and benefits to adjacent land) of complying with the guidelines in the FWC Bald Eagle Management Plan are similar to those listed above.

Transactional costs of adopting the FWC Bald Eagle Management Plan are likely to be significantly less than the previous federal management plan option.

Any person who wishes to provide information regarding a statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

SPECIFIC AUTHORITY: [373.044](#), [373.103\(8\)](#), [373.113](#), [373.171](#), [373.413](#), [373.414](#), [373.418](#), [373.441](#), [668.003](#), [668.004](#), [668.50](#), [704.06 FS](#).

LAW IMPLEMENTED: [373.019](#), [373.403-373.443](#), [403.031](#), [668.003](#), [668.004](#), [668.50](#), [704.06 FS](#).

A HEARING WILL BE HELD AT THE DATE, TIME AND PLACE SHOWN BELOW:

DATE AND TIME: September 10, 2009, 9:00 a.m.

PLACE: South Florida Water Management District, 3301 Gun Club Road, B-1 Auditorium, West Palm Beach, FL 33406

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this workshop/meeting is asked to advise the agency at least 5 days before the workshop/meeting by contacting: South Florida Water Management District Clerk, (800)432-2045, ext. 2087 or (561)682-2087. If you are hearing or speech impaired, please contact the agency using the Florida Relay Service, 1(800)955-8771 (TDD) or 1(800)955-8770 (Voice).

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: Anita R. Bain, Division Director, Environmental Resource Permitting, Environmental Resource Regulation Department, P. O. Box 24680, West Palm Beach, FL 33416-4680, (800)432-2045, ext. 6866 or (561)682-6866, email: [abain@sfwmd.gov](mailto:abain@sfwmd.gov) or Susan Martin, Senior Specialist Attorney, South Florida Water Management District, P. O. Box 24680, West Palm Beach, FL 33416-4680, (800)432-2045, ext. 6251 or (561)682-6251, email: [smartin@sfwmd.gov](mailto:smartin@sfwmd.gov). For procedural questions, contact Jan Sluth, Senior Paralegal, South Florida Water Management District, P. O. Box 24680, West Palm Beach, FL 33416-4680, (800)432-2045, ext. 6299 or (561)682-6299, email: [jsluth@sfwmd.gov](mailto:jsluth@sfwmd.gov)

THE FULL TEXT OF THE PROPOSED RULE IS:

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,\_\_\_\_\_.

NAME OF PERSON ORIGINATING PROPOSED RULE: Anita R. Bain, Division Director, Environmental Resource Permitting, Environmental Resource Regulation

NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: South Florida Water Management District Governing Board

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: July 9, 2009

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAW: July 3, 2008

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 Rule 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 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) ~~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 Rule 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; water quality; upland habitat for Bald Eagle (*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 Eagle (*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 wetland 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 paragraph 68A-16.002(1)(a), F.A.C. (May 15, 2008) or a valid authorization as described in paragraph 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 ONLY 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.