

## LEGAL MEMORANDUM



# Everglades Law Center, Inc.

*Defending Florida's Ecosystems  
and Communities*

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To: Everglades Coalition  
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Michael Braunschweig, J.D. Candidate, NSU Shepard Broad Law  
Center  
**RE: SFMWD ERP "Elimination or Reduction" Rules and Degraded  
Wetlands**  
Date: June 15, 2009

Having recently been involved in or observed a number of Environmental Resource Permit decisions at the SFWMD, we thought it might be useful to share some observations about the Districts "reduction or elimination" rules, particularly as they may concern wetlands within the Everglades ecosystem. As many of this ecosystem's wetlands have been impacted (restoring the Everglades is a major specific objective of the District) issues may arise relative to the rules which require applicants to adequately eliminate or reduce impacts before proceeding to mitigation.

The statutes which govern the issuance of ERPs and the District's administrative rules in general require strong protection of wetlands. A comprehensive discussion of the various aspects of those provisions is described in an August 2008 letter from our firm to the SFWMD Governing Board, which is attached. The primary intent of Florida's wetland permitting laws is to protect wetlands, and the law states that wetland protection must be balanced with vital state interests, essential economic development, and the public interest. Since wetlands are to be protected to the extent practicable, the ERP rules require elimination and reduction of wetland impacts. (Basis of Review for ERP Applications Within the SFWMD, hereinafter 'B.O.R.'). After wetland impacts have been avoided or minimized, appropriate mitigation plans can be considered.

State ERP rules emphasize requiring a permit applicant to make all practicable modifications to the development proposal that would avoid or minimize impacts upon wetlands. Once ERP permit applicants have proven that they have minimized impact upon wetlands, the permit applicant may then propose mitigation to offset the impacts. The SFWMD need not grant ERP permits to all mitigation proposals, but merely consider the mitigation proposal. Sections 373.414(1) (b) and 403.918(2) (b), Fla. Stat. Mitigation must truly offset the specific adverse impacts caused by the project. Southwest Florida Management District v. Charlotte County, 774 So. 2d 903, 910-912 (Fla. 2<sup>nd</sup> DCA 2001). The District's discretion to deny ERP permits for projects requiring mitigation further evidences the importance of avoiding and minimizing impacts upon wetlands.

Below are pertinent rules from the B.O.R.

#### **4.2.1 Elimination or Reduction of Impacts**

The degree of impact to wetland and other surface water functions caused by a proposed system, whether the impact to these functions can be mitigated and the *practicability of design modifications for the site*, as well as alignment alternatives for a proposed linear system, *which could eliminate or reduce impacts to these functions, are all factors in determining whether an application will be approved* by the District. *Design modifications to reduce or eliminate adverse impacts must be explored, as described in subsection 4.2.1.1. Any adverse impacts remaining after practicable design modifications have been implemented may be offset by mitigation as described in subsections 4.3 - 4.3.9.* An applicant may propose mitigation, or the District may suggest mitigation, to offset the adverse impacts caused by regulated activities as identified in sections 4.2 - 4.2.8.2. To receive District approval, a system cannot cause a net adverse impact on wetland functions and other surface water functions which is not offset by mitigation. (emphasis added)

#### **4.3 Mitigation**

Protection of wetlands and other surface waters is preferred to destruction and mitigation due to the temporal loss of ecological value and uncertainty regarding the ability to recreate certain functions associated with these features. *Mitigation will be approved only after the applicant has complied with the requirements of subsection 4.2.1 regarding practicable modifications to eliminate or reduce adverse impacts.* However, any mitigation proposal submitted by an applicant shall be reviewed concurrently with the analysis of any modifications pursuant to subsection 4.2.1. This section establishes criteria to be followed in evaluating mitigation proposals. Mitigation as described in sections 4.3 - 4.3.9 is required only to offset the adverse impacts to the functions as identified in sections 4.2 - 4.2.9. caused by regulated activities. *In certain cases, mitigation cannot offset impacts sufficiently to yield a permit table project.* Such cases often include activities which significantly degrade Outstanding Florida Waters, adversely impact habitat for listed species, or adversely impact those wetlands or other surface waters not likely to be successfully recreated. (emphasis added)

Reasonable design modifications include altering the size and location of structures proposed for construction within wetlands. Permit applicants must prove that they have made all practicable design changes to minimize wetland impacts without compromising the economic viability of the project. Thus, the permitting process reflects the intent of the law to protect wetlands as much as possible. Rule 62-312.060, F.A.C., §4.2.1.2, B.O.R.

As per the language and intent of the ERP laws, exemptions to avoidance and minimization of wetland impacts must be carefully scrutinized as a matter of policy. However, some recent ERP permits have granted, or hinted at an exemption to the requirement that applicants reduce or eliminate impacts upon wetlands. B.O.R. §4.2.2.3 sets forth the following criteria to be used to determine whether a wetland is of “low quality” in order to qualify for this exemption:

- (a) condition,
- (b) hydrologic connection,
- (c) uniqueness,
- (d) location, and
- (e) fish and wildlife utilization.

The B.O.R. requires a weighing of these criteria based upon a site-specific analysis of the ecosystem of which the project site is part. Because it determines whether and how much an applicant must avoid and minimize impacts to existing wetlands, a decision by District regulatory staff to allow a wetland to be defined as “low quality” has very substantial consequences, dictating the most fundamental decision that is made by a permitting decision. Obviously an applicant would tend to want the wetlands to be impacted to be so defined, and that pressure could lead to an inappropriately liberal application of the §4.2.2.3 exemption that is inconsistent with the overall intent of the law and weakens the protection of wetlands in south Florida.

The existence and priority of the Comprehensive Everglades Restoration Plan springs largely from the consensus scientific understanding that the extent of loss and impact to wetlands has had unacceptable cumulative impacts and that active restoration is necessary. *A Vision Statement for the Comprehensive Everglades Restoration Plan*, U.S. Army Corps of Engineers and the South Florida Water Management District. A very substantial amount of the remaining wetlands in south Florida have already been adversely impacted by development, roads and drainage. A substantial amount of are the focus of specific restoration projects or efforts, and more have the potential for restoration.

A concern is that an over-emphasis on the impacted “condition” of currently degraded wetlands that are the subject of CERP, without regard for their relationship to the larger ecosystem and restoration plans would paradoxically allow less, not more, protection of the very wetlands the state is seeking to restore. But, the plain terms of the criteria for the exemption in §4.2.2.3 would seem to preclude a determination of “low quality” for most of the remaining wetlands in south Florida. While an applicant might argue that the “condition”, and perhaps the “fish and wildlife” utilization (Subsections (c) and (e) support a categorization of “low quality”, the “hydrologic connection”, “uniqueness”, “location”, and perhaps the “fish and wildlife utilization” criteria of an impacted wetland in a part of the system that is subject to a restoration project or restorable would strongly militate against such a finding. That greater number of criteria, and more importantly their greater weight in the context of one of the worlds’ most important ecosystem should generally preclude the granting of the exemption and failure of the District to fully apply the avoidance and minimization rule.