

David M. Caldevilla  
Edward P. de la Parte, Jr.  
Richard A. Gilbert

■ ■ ■  
de la Parte & Gilbert, P.A.  
ATTORNEYS AT LAW

Donald C. Greiwe  
Patrick J. McNamara  
Nicolas Q. Porter

Louis A. de la Parte, Jr.  
*Founder (1929-2008)*

November 23, 2020

**Via Email and U.S. Mail**  
**[plante.ken@leg.state.fl.us](mailto:plante.ken@leg.state.fl.us)**

Kenneth Plante, Esq.  
Coordinator, Committee Director  
& General Counsel  
Joint Administrative Procedures Committee  
Room 680, Pepper Building  
111 West Madison Street  
Tallahassee, FL 32399-1400

Re: **Everglades Agricultural Area Reservation Rule**

Dear Mr. Plante,

I am submitting this letter on behalf of the City of West Palm Beach, Florida (City) with respect to the South Florida Water Management District's (SFWMD) Notice of Proposed Rule regarding Rules 40E-0.21, 40E-10.031 and 40E-10.061, Florida Administrative Code (F.A.C.) and Notice of Proposed Rule regarding Rule 40E-2.091, F.A.C. and the Applicant's Handbook for Water Use Permit Applications within SFWMD (Applicant's Handbook), which were published in the Florida Administrative Register on October 16, 2020 (Proposed Rule), a copy of which is attached as **Exhibit A**. We understand a copy of the Proposed Rule has been provided to the Joint Administrative Procedures Committee (Committee) pursuant to Section 120.54(3)(a)4, Florida Statutes.

The City is the largest municipality in Palm Beach County with more than 110,000 residents. The City operates a public water supply system that provides clean, safe and cost-effective potable water to approximately 150,000 residents of the City, the Town of Palm Beach and the Town of South Palm Beach. The City's water system also helps maintain water stages in Grassy Waters Preserve, a unique remnant of the Everglades located within the City's boundaries, and provides fresh water to the Northwest Fork of the Loxahatchee River, a federally designated Wild and Scenic River, as part of the recovery strategy for the minimum flow established by SFWMD for this watercourse. The City's water use is a legally protected existing use pursuant to the long-standing Water Use Permit 50-00615-W issued by SFWMD. The primary source of water for the City's water system is Lake Okeechobee (the Lake).

The Proposed Rule will prospectively reserve all surface water discharged from the Everglades Agricultural Area (EAA) Reservoir and directed to the Lower East Coast Everglades waterbodies through the S-624, S-625, and S-626 structures for the protection of fish and wildlife pursuant to Section 373.223(4), Florida Statutes. The source of water for the EAA

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Reservoir and this reservation is the Lake. Since the Lake is the supply source for the City and thousands of other permitted water users throughout Southern Florida, proper integration of permitted water rights with the Proposed Rule and the Lake's operation is necessary to comply with Florida and federal law, and is vital to those who are dependent on water supply from the Lake such as the City's residents and the millions of other utility customers along the Lower East Coast. The Proposed Rule, however, fails to accomplish this goal and threatens the water supply of all these permitted users.

Since 2008, when the interim Lake Okeechobee Regulations Schedule (LORS08) was approved as an emergency public safety measure during repair of the Herbert Hoover Dike (HHD), permitted water users like the City, who are dependent on the Lake for their water supply, have suffered an erosion of their water rights, and the Lake's minimum level established under state law by SFWMD's rules has been violated by LORS08. All these permitted users were assured that these impacts were temporary and were necessitated only by the HHD repairs. The HHD repairs are nearly complete and a new Lake regulation schedule is expected in 2022. Recovery of temporarily eroded water rights, as promised, should therefore occur soon. Instead, the Proposed Rule and the water described as reserved for fish and wildlife accept the LORS08 schedule as a permanent feature. In so doing, it breaks promises made to water supply users dependent on the Lake, that LORS08 would be temporary and violates substantial provisions of state and federal law in the process.

As a consequence, the City and several other affected water users have requested a public hearing and the opportunity to present evidence and argument on all issues under consideration by SFWMD regarding the Proposed Rule. Additionally, the City and several other persons submitted proposals for lower cost regulatory alternatives as provided for in Sections 120.54(3)(a)1 and 120.541(1), Florida Statutes. SFWMD granted these requests and scheduled the Proposed Rule for a public hearing before its Governing Board on December 10, 2020.

While the Proposed Rule remains pending and before SFWMD takes final action we wanted to bring certain matters to the attention of the Joint Administrative Procedures Committee (Committee). We understand the Committee's role is to act as a legislative check on an agency's rulemaking authority by examining each proposed rule for the purpose of determining whether:

- (a) The rule is an invalid exercise of delegated legislative authority.

\* \* \*

- (f) The rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements.
- (g) The rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law which the rule implements.

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(h) The rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule.

(i) The rule could be made less complex or more easily comprehensible to the general public.

(j) The rule's statement of estimated regulatory costs complies with the requirements of s. 120.541 and whether the rule does not impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

*See* §120.545(1), Fla. Stat. The Committee fulfills this role by requesting an agency to provide such information as is reasonably necessary for examination of a rule and, if necessary, to object to a rule as being inconsistent with the specific items listed in Section 120.545(1). My client believes that certain provisions of the Proposed Rule do not comply with all or some of the factors listed above, and the Committee should request SFWMD to provide such information as is reasonably necessary to address these factors. If the information provided by SFWMD does not sufficiently or adequately address these concerns, we request that the Committee object to the Proposed Rule pursuant to Section 120.545, Florida Statutes.

**The Proposed Rule is Contrary to State and Federal Law**

The Proposed Rule is inconsistent with express legislative intent regarding the EAA Reservoir and is an invalid exercise of delegated legislative authority.

The Proposed Rule will reserve water for the EAA Reservoir, which is a component of the Comprehensive Everglades Restoration Plan (CERP) and the Central Everglades Planning Project (CEPP). According to Section 373.4598(1)(d), Florida Statutes, if SFWMD implements the EAA Reservoir as a project component of CERP, then **“the district must abide by all applicable state and federal laws relating to such project.”** (Emphasis Added). The federal laws applicable to the EAA Reservoir are the Water Resources Development Act (WRDA) of 2000, the Programmatic Regulations adopted by the U.S. Army Corps of Engineers (Corps) (33 CFR Part 385), and the Guidance Memorandums adopted by the Corps pursuant to the Programmatic Regulations. 33 CFR 385.5. All these federal laws clearly state SFWMD may only adopt the reservation or allocation specifically identified in the Project Implementation Report for the EAA Reservoir.

Sections 601(h)(2)(A) and 601(h)(4)(A)(iii)(V) of WRDA 200 require that water identified in a project implementation report be reserved or allocated for the natural system by the State of Florida. *See also* §373.470(3)(c), Florida Statutes. The Programmatic Regulations provide that “the District Engineer shall verify in writing that the South Florida Water Management District or the Florida Department of Environmental Protection has executed under State law the reservation or allocation of water for the natural system **as identified in the Project**

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**Implementation Report.”** (Emphasis Added). *See* 33 CFR 385.27(b). 33 CFR 385.27(c) prohibits SFWMD from unilaterally modifying the reservation or allocation set forth in a project implementation report. Similarly, Section 4.8 of Guidance Memorandum 4 (Identifying Water Made Available for the Natural System and Other Water-Related Needs) states, “...the State will protect the water for the natural system by taking the following actions: 1) the State will use its water reservation or allocation authority to protect water made available for the natural system from each project as required by section 601 of WRDA 2000.... **Language setting forth these commitments will be included in the Plan implementation section of each PIR in the subsection entitled “Identification of Water Made Available....”** (Emphasis added).

In the case of the EAA Reservoir, the applicable project implementation report is the Central Everglades Planning Project - Final Integrated Implementation Report and Environmental Impact Statement dated December 2014 (EAA PIR). Other related reports governing the development of the EAA Reservoir are the Central Everglades Planning Project Post Authorization Change Report dated March 2018 (CEPP PACR) and the Central and Southern Everglades Agricultural Area Final Environmental Impact Statement dated January 2020 (EAA EIS). These reports are referred to herein collectively as the “EAA Reservoir Reports.” **None of the EAA Reservoir Reports identify the reservation of water pursuant to section 373.223(4), Florida Statutes as the mechanism required to protect the water made available by the EAA Reservoir!** All these Reports unequivocally state that SFWMD’s existing rules are adequate to protect the water made available by this project. The language contained in Annex B of the EAA PIR is illustrative of this fact.

**The SFWMD will continue to rely upon its existing restricted allocation area rules to protect the water made available by the CEPP project features as required by Section 373.470, F.S.** Protection of water made available by CEPP project features is required in order for the SFWMD and the Department of the Army to enter into one or more Project Partnership Agreements to construct the CEPP project features. The combination of protecting the existing water and protecting the water made available by the CEPP project features is required for the CEPP to achieve its intended benefits.

(Emphasis added).

In sum, the EAA Reservoir Reports all contain language stating that the water made available by the EAA Reservoir for fish and wildlife will be protected by SFWMD’s existing restricted allocation rules. None of these reports indicate that this water needs to be protected through a water reservation pursuant to Section 373.223(4), Florida Statutes. SFWMD would be acting contrary to federal law should it attempt to protect this water by reserving it pursuant Section 373.223(4), Florida Statutes. Therefore, SFWMD is legally prohibited under the express legislative intent of Section 373.4598(1)(d), Florida Statutes from using its rulemaking authority to adopt the Proposed Rule.

**The Proposed Rule is Not Necessary to Accomplish the Objectives of the Law to be Implemented**

According to the Proposed Rule, the law being implemented is Section 373.470, Florida Statutes. Section 373.470(3)(c), Florida Statutes provides in pertinent part as follows:

Prior to executing a project cooperation agreement with the Corps for the construction of a project component, the district, in cooperation with the Corps, shall complete a project implementation report to address the project component's economic and environmental benefits, engineering feasibility, and other factors provided in s. 373.1501 sufficient to allow the district to obtain approval under s. 373.026. Each project implementation report shall also identify the increase in water supplies resulting from the project component. **The additional water shall be allocated or reserved by the district under this chapter.**

(Emphasis added). Thus, the objectives of the law to be implemented can be achieved either through a water reservation under Section 373.223(4), Florida Statutes or through some other water allocation processes authorized under Chapter 373.

It makes no sense to try to prospectively reserve the water made available for this project at this time. This water will not be needed until the project is fully constructed and operational. To date, the EAA Reservoir Project has not yet been funded by Congress and, if funded, would not be completed until 2027. By then the Corps will have replaced LORS08 with the Lake Okechobee System Operating Manual (LOSOM) in 2022. The Proposed Rule itself recognizes that whatever water reservation is adopted today will have to be revised after the reservoir is completed and LOSOM22 is adopted. Specifically, Rule 40E-10.061(3)(d) states, "The reservation contained in paragraph 40E-10.061(3)(a), F.A.C., above, and the criteria contained in Section 3.11.65 of the Applicant's Handbook, incorporated by reference in Rule 40E-2.091, F.A.C., will be revised before the EAA Reservoir is deemed operational, including an approved system or project operating manual..."

Since all the EAA Reservoir Reports indicate that the water made available by the EAA Reservoir Project for fish and wildlife can be protected using SFWMD's existing restricted allocation rules, adopting the Proposed Rule is unnecessary at this time. This option would fulfill the objectives of Section 373.470, without impacting the rights of existing legal users and would provide affected persons such as the City a future point of entry should SFWMD decide to enact a reservation rule after the reservoir is completed and the final operating schedules and protocols have been adopted.

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**The Proposed Rule is an Unreasonable Implementation of the Law as it Affects Persons Particularly Affected by the Rule**

The persons particularly affected by the Proposed Rule are those existing permitted users like the City, that rely on the Lake for their source of water supply. According to Section 373.223(4), Florida Statutes, when reserving water from consumptive use, “all presently existing legal uses of water shall be protected so long as such use is not contrary to the public interest.” Unfortunately, the Proposed Rule does not accord these existing permitted users the protection afforded by statute.

The only attempt to protect existing legal uses of water is found in Section 3.11.6 of the Applicant’s Handbook, which provides as follows:

The Everglades Agricultural Area Water Reservation as stated in paragraph 40E-10.061(3)(a), F.A.C. protects the Central Everglades Planning Project water needed for fish and wildlife within the Lower East Coast Everglades Waterbodies. Applications deemed complete before the conditions identified in paragraph 40E-10.061(3)(b), F.A.C., and which otherwise satisfy the requirements of Chapter 40E-2, F.A.C., as applicable, do not use water reserved under paragraph 40E-10.061(3)(a), F.A.C.

In essence, this provision states that only those applications deemed complete and which otherwise meet SFWMD’s permitting requirements at the time SFWMD revises the water reservation before the reservoir is deemed operational are protected from the water reservation.

This is an inadequate implementation of the existing legal use clause in Section 373.223(4) for several reasons. First, it does not offer any protection to existing permitted users at the time the Proposed Rule is adopted. According to Rule 40E-10.061(3)(a), F.A.C., all surface water released via operation, from the EAA Reservoir, is reserved upon enactment and the Proposed Rule does contain any language that defers the reservation to some later date. Second, Section 3.11.6 only comes into play should SFWMD decide to revise the water reservation. If SFWMD decides for whatever reason to keep the existing reservation, then this section has no application. Third, even if SFWMD decides to revise the reservation, Section 3.11.6 would only protect permit applicants and not existing permitted users such as the City. For example, the City’s Water Use Permit 50-00615-W is scheduled to expire in 2033, and it is highly unlikely the City would be applying for a permit, when the reservoir is deemed operational sometime in 2027. Finally, even for those users who have pending applications at the time SFWMD decides to revise the water reservation, their use is only protected if they meet SFWMD’s permitting rules in Chapter 40E-2. This a far stricter requirement than provided for in Section 373.223(4), Florida Statutes, which states that existing legal uses are protected so long as such uses are not contrary to the public interest. The permitting rules in Chapter 40E-2 implement the three-prong test in Section 373.223(1), Florida Statutes, which requires proof that a use is a reasonable-beneficial use and will not interfere with any presently existing legal uses, in addition to demonstrating the use is in the public interest.

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In sum, for the reasons stated above, the Proposed Rule is an unreasonable implementation of the water reservation statute.

### **The Proposed Rule Could be Made Less Complex or More Easily Comprehensible to the General Public**

Rule 40E-10.061(3)(a), F.A.C. states, “All surface water released, via operation, from the EAA Reservoir that is directed to the Lower East Coast Everglades Waterbodies through Structures S-624, S-625, and S-626 (see Figure 3-6) is reserved from allocation.” Rule 40E-10.061(3)(c), F.A.C. goes on to state in part, “Model simulations of the draft operating protocol predict the EAA Reservoir, together with existing and planned infrastructure and a modified Lake Okeechobee schedule will convey 825,000 acre-feet of surface water during an average annual water year (May-April) (see Figure 3-7), thereby increasing existing flows on average annually to the Central Everglades by 370,000 acre-feet over the period of simulation (1965-2005). . . .” So, the question is, does the Proposed Rule only reserve 825,000 acre-feet of surface water or does it reserve some unknown quantity of surface water that could be less than or greater than 825,000 acre-feet. If SFWMD intends that the Proposed Rule reserve an undetermined quantity of water, then why include language describing a model simulation of a draft operating schedule, which SFWMD admits will be revised once the reservoir is deemed operational and the final project operating manual is approved. The juxtaposition of the reference to 825,000 acre-feet in Rule 40E-10.061(3)(b) against the “**reservation-of-all-water**” statement in 40E-10.061(3)(a) creates an ambiguity and leaves the public guessing as to what is actually being reserved.

Similarly, Rule 40E-10.061(3)(d), F.A.C. states, “Water Reserved from the EAA Reservoir through structure S-628 is not reserved.” However, that same provision goes on to state “Model simulations of the draft operating protocol predict the EAA Reservoir, together with existing and planned infrastructure and a modified Lake Okeechobee schedule, will convey 82,000 acre-feet of surface water during an average annual water year through structure S-628 (see Figure 3-8).” Again, this calls into question whether this exclusion from the proposed reservation is limited to 82,000 acre-feet of surface water or whether the exclusion represents a quantity that is less than or greater than 82,000 acre-feet. Again, if SFWMD wishes to exclude all the water discharged through structure S-628 from the water reservation, then why even mention a model simulation of a draft operating schedule, which will be revised once the reservoir becomes operational. As this provision is currently written, the general public cannot easily comprehend the quantity of water that is being excluded from the reservation.

In sum, as presently written, the Proposed Rule is not easily comprehensible. A fair reading of the rule leaves the reader unsure as to the quantity of water that is being reserved from allocation and the quantity of water that is being excluded from the reservation at structure S-628.

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### **The Adoption of Lower Costly Alternatives Would Substantially Accomplish the Statutory Objectives**

The statutory objective is set forth in Section 373.470(3)(c), Florida Statutes, which is to allocate or reserve water made available by the EAA Reservation Project for fish and wildlife. This goal can be accomplished through several lower cost regulatory alternatives recommended by the City.

First, at this time SFWMD does not have to reserve all the water discharged to the EAA Reservoir Project. All the EAA Reservoir Reports indicate that the water made available by the project can be protected under SFWMD's existing restricted allocation rules. This would enable SFWMD to enter a Project Partnership Agreement with the Corps to move the project forward. Additionally, it would ensure that when the project was completed and the final operation protocol was adopted, SFWMD and the public would have a better understanding as to the exact quantity of water that would be reserved from allocation. This would also provide a point of entry for affected persons like the City to challenge the reservation should the quantity that is being reserved impact their protected permitted legal use. This option would avoid a premature legal challenge prior to the project being constructed.

Second, SFWMD can agree to sunset the rule shortly prior to the reservoir being deemed to be operational. That would force SFWMD to re-initiate rulemaking to adopt a new reservation. This is what SFWMD had indicated in the Proposed Rule that it intends to do. This option would ensure that the City and other affected permitted users would have a point of entry to protect their legal rights. This option would also avoid a premature legal challenge prior to the project being constructed.

Third, SFWMD could replace Section 3.11.6 of the Applicant's Handbook with language that actually complies with Section 373.223(4), Florida Statutes as it applies to existing legal uses. The new language would exclude existing permitted uses that continue to be in the public interest from the proposed water reservation. Not only is this consistent with the applicable statute, but also would be a fairer and more equitable way to approach this issue. In point of fact, this is the route SFWMD took with respect to its recently proposed Kissimmee River Reservation rule.

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ATTORNEYS AT LAW

We appreciate the opportunity to bring our concerns to the Committee's attention. We would be happy to respond to any questions you or your staff have concerning the matters raised in this letter. Also, the City would be more than willing to appear before the Committee to discuss the Proposed Rule and our comments.

Sincerely yours,

de la Parte & Gilbert, P. A.



Edward P. de la Parte, Jr.

Enclosure

cc: Jamie Royal, Esq., JAPC  
SFWMD Governing Board  
Drew Bartlett, Executive Director, SFWMD  
Carolyn Ansay, Esq., General Counsel, SFWMD  
Don Medellin, Principal Scientist, SFWMD  
Jennifer Brown, Esq., Senior Attorney, SFWMD  
Mayor Keith A. James, West Palm Beach  
Ricardo Mendez-Saldivia, Assistant City Administrator  
West Palm Beach  
Kimberly Rothenburg, Esq., City Attorney  
West Palm Beach  
Poonam K. Kalkat, Director of Public Utilities,  
West Palm Beach

# **EXHIBIT A**

## NOTICE OF PROPOSED RULE

### **WATER MANAGEMENT DISTRICTS**

#### **South Florida Water Management District**

##### **RULE NOS.:RULE TITLES:**

40E-10.021 Definitions

40E-10.031 Water Reservations Implementation

40E-10.061 Water Reservation Areas: Lower East Coast Planning Area

**PURPOSE AND EFFECT:** The Everglades Agricultural Area (EAA) Reservoir is a critical component of Central Everglades Planning Project (CEPP) in the Comprehensive Everglades Restoration Plan (CERP). The project helps avoid harmful lake discharges to the St. Lucie and Caloosahatchee estuaries and sends more water south to the Central Everglades.

Section 601 of WRDA 2000 and Section 373.470, F.S., require the State to protect water made available for the natural system by CERP projects from allocation to consumptive uses. Legal protection of the water is required before the South Florida Water Management District (District) and the U.S. Army Corps of Engineers (USACE) may execute a Project Partnership Agreement (PPA) to cost-share the construction of CERP project features. The District is fulfilling these requirements by adopting rules reserving the water released from the EAA Reservoir Project to the central Everglades.

**SUMMARY:** The proposed water reservation rule protects all surface water released from the EAA Reservoir directed to the Lower East Coast Everglades waterbodies through the S-624, S-625, and S-626 structures (Figure 3-6 and 3-7). Model simulations of the draft operating protocol predict the EAA Reservoir, together with existing and planned infrastructure and a modified Lake Okeechobee schedule, will convey 825,000 acre-feet of surface water during an average annual water year (May-April) to the EAA Reservoir Project's STA, STA-2, STA-3/4, or A-1 FEB, then discharge to the Lower East Coast Everglades waterbodies.

##### **SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS AND LEGISLATIVE RATIFICATION:**

The agency has determined that this will not have an adverse impact on small business and is not likely to increase, directly or indirectly, regulatory costs in excess of \$200,000 in the aggregate within one year after the implementation of the rule. A Statement of Estimated Regulatory Costs (SERC) has not been prepared by the agency. The Agency has determined that the proposed rule is not expected to require legislative ratification based on the SERC or, if no SERC is required, the information expressly relied upon and described herein: The District completed the Governor's Office of Fiscal Accountability and Regulatory Reform's (OFARR) form "Is a SERC Required?" and prepared a summary of the proposed rule amendments, both of which are available upon request. Based on the completed "Is a SERC Required?" form and the District's summary and analysis performed to prepare and complete said documents, the proposed rule amendment does not require legislative ratification pursuant to subsection 120.541(3), F.S.

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

**RULEMAKING AUTHORITY** (formerly "Specific Authority"): 373.044, 373.113, 373.171 FS.

**LAW IMPLEMENTED:** 373.016, 373.026, 373.036, 373.1501, 373.1502, 373.219, 373.223, 373.4592, 373.4595, 373.470 FS.

**IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING WILL BE SCHEDULED AND ANNOUNCED IN THE FAR.**

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: District Clerk @ 1(800)432-2045, ext. 6805 or (561)682-6805. 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).

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:** Don Medellin, Principal Scientist, P. O. Box 24680, West Palm Beach, FL 33416-4680, 1(800)432-2045, ext. 6340 or (561)682-6340,

dmedelli@sfwmd.gov.

THE FULL TEXT OF THE PROPOSED RULE IS:

40E-10.021 Definitions.

(1) through (6) No change.

(7) Everglades Agricultural Area (EAA) Reservoir – A reservoir located in Palm Beach County, Florida, south of the City of South Bay between the Miami and North New River Canals as described in Appendix 3 and depicted in Figure 3-5.

*Rulemaking Authority 373.044, 373.113, 373.171 FS. Law Implemented 373.016, 373.026, 373.036, 373.1501, 373.1502, 373.219, 373.223, 373.4592, 373.4595, 373.470 FS. History–New 7-2-09, Amended 3-18-10, 7-21-13, 7-16-14, \_\_\_\_\_.*

40E-10.031 Water Reservations Implementation.

(1) through (5) No change

(6) Water reserved for the protection of fish and wildlife released via operation from the EAA Reservoir is defined in subsection 40E-10.061(3)(a), F.A.C.

*Rulemaking Authority 373.044, 373.113, 373.171 FS. Law Implemented 373.016, 373.026, 373.036, 373.1501, 373.1502, 373.219, 373.223, 373.4592, 373.4595, 373.470 FS. History–New 7-2-09, Amended 3-18-10, 7-21-13, 7-14-14, 7-16-14, \_\_\_\_\_.*

40E-10.061 Water Reservation Areas: Lower East Coast Planning Area.

(1) through (2) No change.

(3) EAA Reservoir:

(a) All surface water released, via operation, from the EAA Reservoir that is directed to the Lower East Coast Everglades Waterbodies through Structures S-624, S-625, and S-626 (see Figure 3-6) is reserved from allocation.

(b) The water prospectively reserved under this subsection is not available for fish and wildlife until the Governing Board makes a formal determination, pursuant to state and federal law, that the EAA Reservoir is operational.

(c) Model simulations of the draft operating protocol predict the EAA Reservoir, together with existing and planned infrastructure and a modified Lake Okeechobee schedule, will convey 825,000 acre-feet of surface water during an average annual water year (May-April) (see Figure 3-7), thereby increasing existing flows on average annually to the Central Everglades by 370,000 acre-feet over the period of simulation (1965-2005). The reservation contained in paragraph 40E-10.061(3)(a), F.A.C., above, and the criteria contained in Section 3.11.6 of the “Applicant’s Handbook for Water Use Permit Applications within the South Florida Water Management District” (Applicant’s Handbook), incorporated by reference in Rule 40E-2.091, F.A.C., will be revised in light of changed conditions or new information. The reservation and criteria in Section 3.11.6 of the Applicant’s Handbook, incorporated by reference in Rule 40E-2.091, F.A.C., will be revised before the EAA Reservoir is deemed operational, including an approved system or project operating manual, and any difference between the quantity of water actually made available and the quantity simulated will be reconciled.

(d) Water released from the EAA Reservoir through structure S-628 is not reserved. Model simulations of the draft operating protocol predict the EAA Reservoir, together with existing and planned infrastructure and a modified Lake Okeechobee schedule, will convey 82,000 acre-feet of surface water during an average annual water year through structure S-628 (see Figure 3-8).

*Rulemaking Authority 373.044, 373.113, 373.171 FS. Law Implemented 373.016, 373.026, 373.036, 373.1501, 373.1502, 373.219, 373.223, 373.4592, 373.4595, 373.470 FS. History–7-21-13, Amended 3-15-17, \_\_\_\_\_.*

APPENDIX 1 AND APPENDIX 2 – No Change.

**APPENDIX 3: LOWER EAST COAST PLANNING AREA 40**

Figures 3-1 through 3-4 B. – No Change.

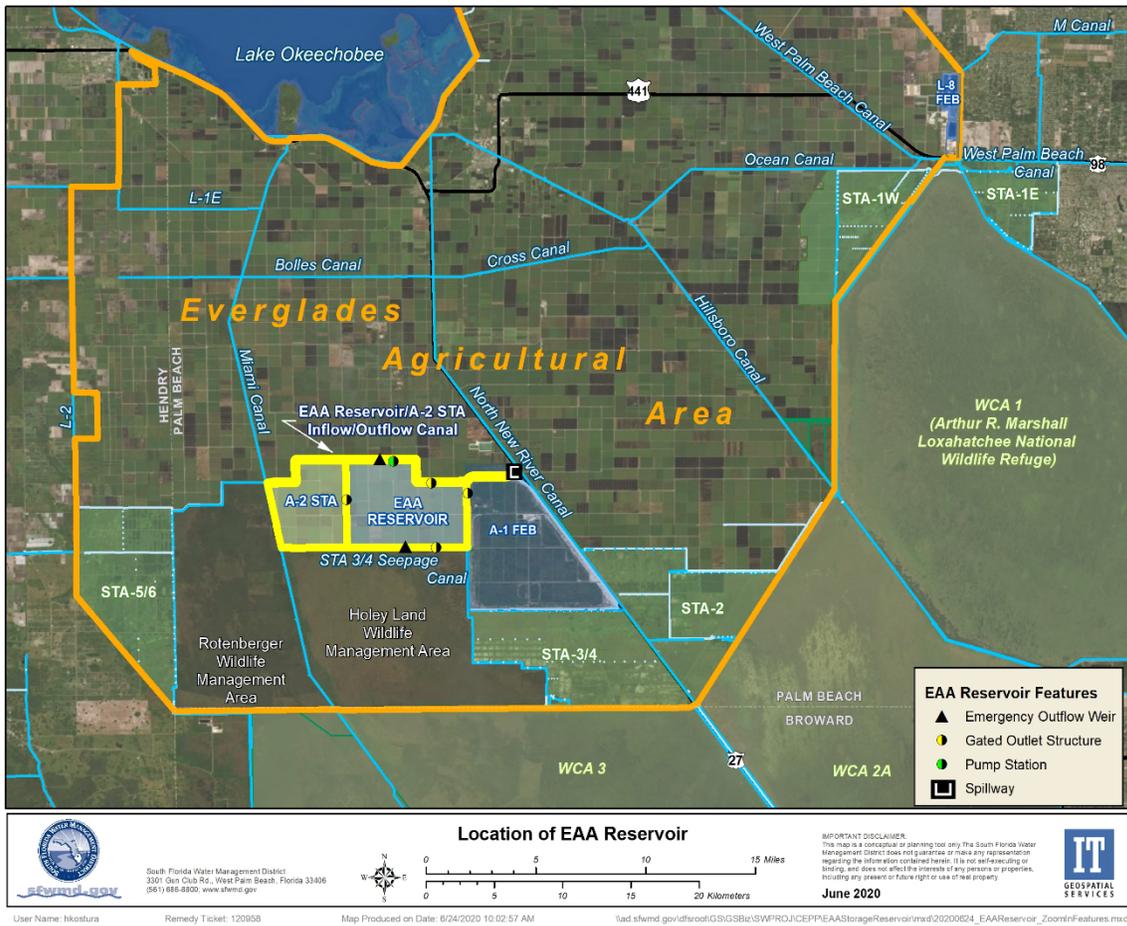


Figure 3-5. Location of the EAA Reservoir.

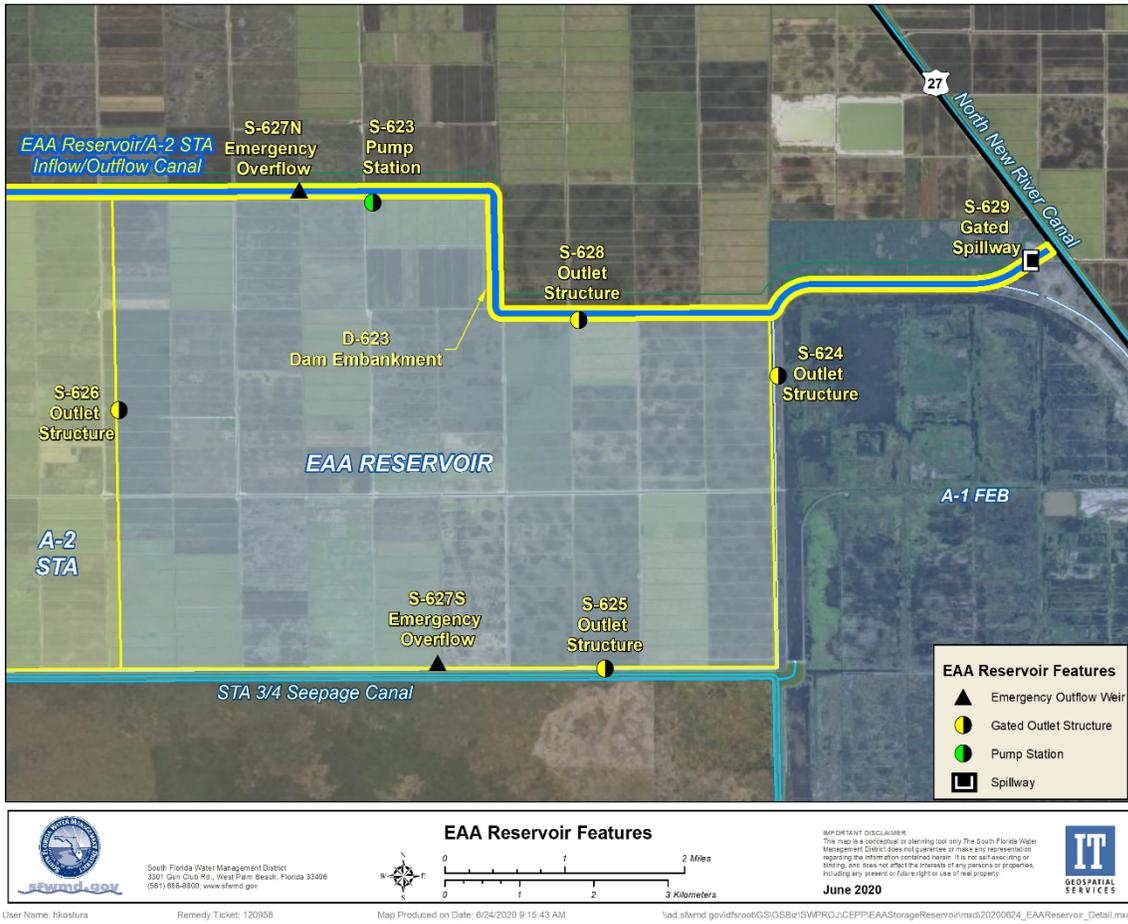


Figure 3-6. Key Features of the EAA Reservoir.

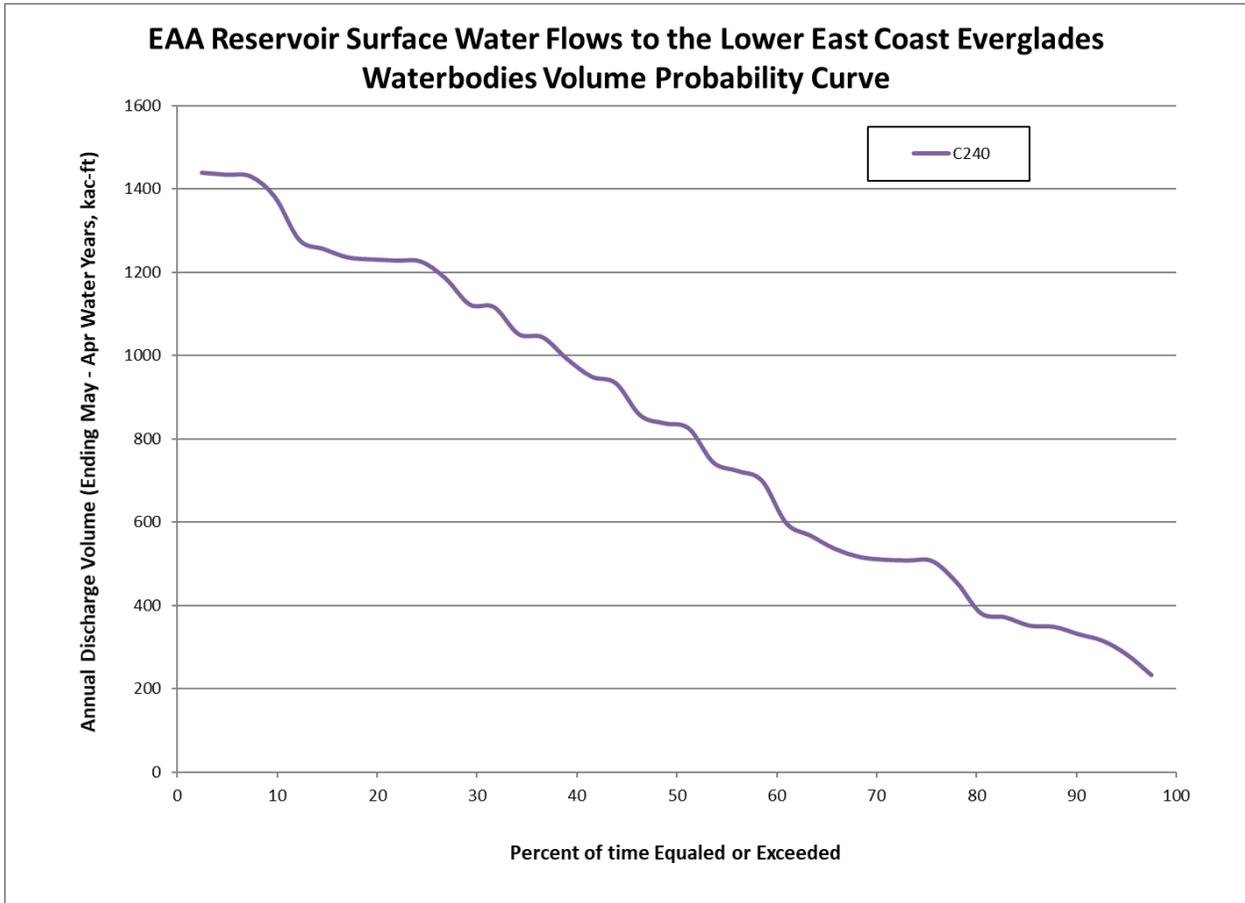


Figure 3-7. EAA Reservoir annual surface water discharges through structures S-624, S-625, and S-626 volume probability curve (May-April water year) from the Alternative C240 model simulation.

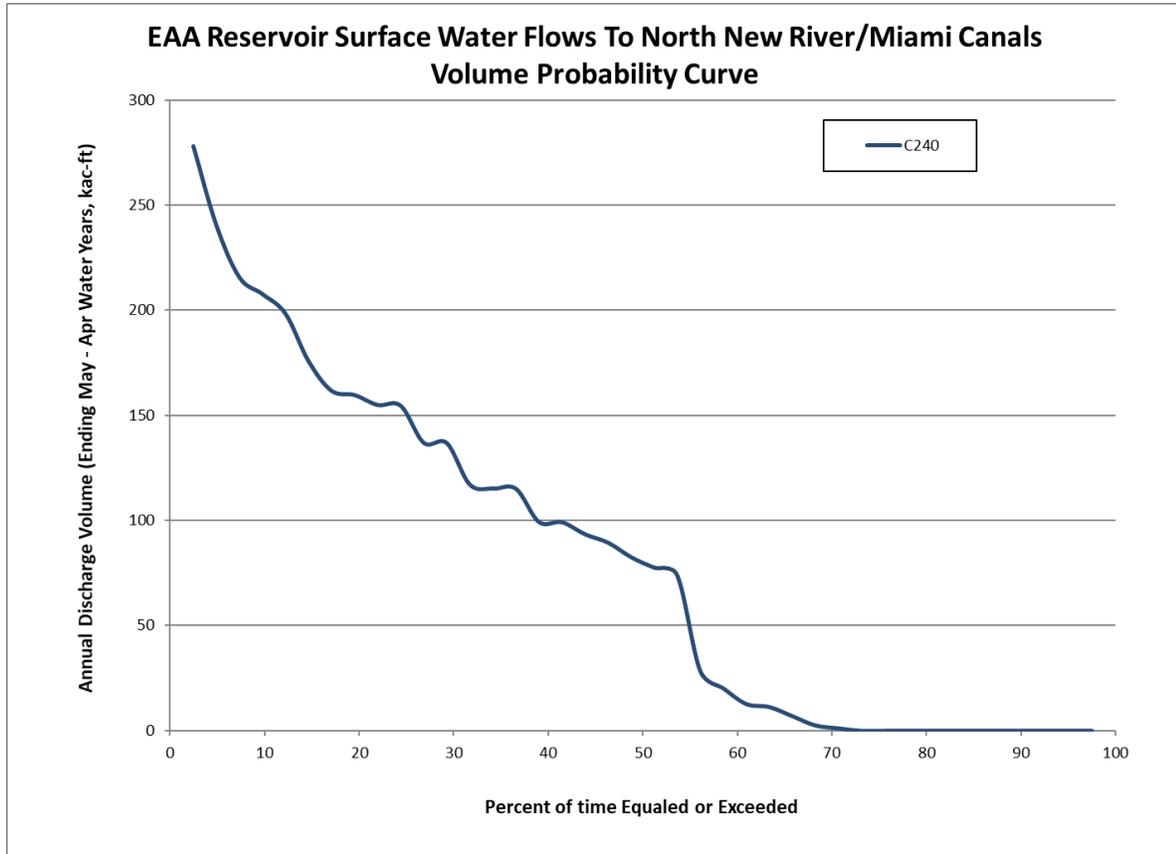


Figure 3-8. EAA Reservoir annual surface water discharges through structure S-628 volume probability curve (May-April water year) from the Alternative C240 model simulation.

NAME OF PERSON ORIGINATING PROPOSED RULE: Lawrence Glenn, Division Director, Water Resources  
 NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: South Florida Water Management District Governing Board  
 DATE PROPOSED RULE APPROVED BY AGENCY HEAD: October 8, 2020  
 DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAR: June 30, 2020

## NOTICE OF PROPOSED RULE

### **WATER MANAGEMENT DISTRICTS**

#### **South Florida Water Management District**

RULE NO.: RULE TITLE:

40E-2.091 Publications Incorporated by Reference

PURPOSE AND EFFECT: The Everglades Agricultural Area (EAA) Reservoir is a critical component of Central Everglades Planning Project (CEPP) in the Comprehensive Everglades Restoration Plan (CERP). The project helps avoid harmful lake discharges to the St. Lucie and Caloosahatchee estuaries and sends more water south to the central Everglades.

Section 601 of WRDA 2000 and Section 373.470, F.S., require the State to protect water made available for the natural system by CERP projects from allocation to consumptive uses. Legal protection of the water is required before the South Florida Water Management District (District) and the U.S. Army Corps of Engineers (USACE) may execute a Project Partnership Agreement (PPA) to cost-share the construction of CERP project features. The District is fulfilling these requirements by adopting rules reserving the water released from the EAA Reservoir Project to the central Everglades.

SUMMARY: The proposed water reservation rule protects all surface water released from the EAA Reservoir directed to the Lower East Coast Everglades waterbodies through the S-624, S-625, and S-626 structures (Figure 3-6 and 3-7). Model simulations of the draft operating protocol predict the EAA Reservoir, together with existing and planned infrastructure and a modified Lake Okeechobee schedule, will convey 825,000 acre-feet of surface water during an average annual water year (May-April) to the EAA Reservoir Project's STA, STA-2, STA-3/4, or A-1 FEB, then discharged to the Lower East Coast Everglades waterbodies.

#### **SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS AND LEGISLATIVE RATIFICATION:**

The agency has determined that this will not have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of \$200,000 in the aggregate within one year after the implementation of the rule. A Statement of Estimated Regulatory Costs has not been prepared by the agency.

The Agency has determined that the proposed rule is not expected to require legislative ratification based on the SERC or, if no SERC is required, the information expressly relied upon and described herein: The District completed the Governor's Office of Fiscal Accountability and Regulatory Reform (OFARR) form "Is a SERC Required?" and prepared a summary of the proposed rule amendments, both of which are available upon request. Based on the completed "Is a SERC Required?" form and the District's summary and analysis performed to prepare and complete said documents, the proposed rule amendment does not require legislative ratification pursuant to subsection 120.541(3), F.S.

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

RULEMAKING AUTHORITY (formerly "Specific Authority"): 373.044, 373.113, 373.171, 373.216 FS

LAW IMPLEMENTED: 373.042, 373.0421, 373.083, 373.109, 373.196, 373.219, 373.223, 373.224, 373.229, 373.232, 373.233, 373.236, 373.239, 373.250 FS

IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING WILL BE SCHEDULED AND ANNOUNCED IN THE FAR.

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: District Clerk @ 1(800)432-2045, ext. 6805 or (561)682-6805. 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: Don Medelli, Principal Scientist, P. O. Box 24680, West Palm Beach, FL 33416-4680, 1(800)432-2045, ext. 6340 or (561)682-6340, dmedelli@sfwmd.gov.

THE FULL TEXT OF THE PROPOSED RULE IS:

40E-2.091 Publications Incorporated by Reference.

(1) The “Applicant’s Handbook for Water Use Permit Applications within the South Florida Water Management District – \_\_\_\_\_, 2020 September 7, 2015” (<http://www.flrules.org/Gateway/reference.asp?No=RefXXXXX>

~~<http://www.flrules.org/Gateway/reference.asp?No=Ref05791>~~) is incorporated by reference herein.

(2) The following forms and materials are referenced in the “Applicant’s Handbook for Water Use Permit Applications within the South Florida Water Management District – \_\_\_\_\_, 2020 September 7, 2015” (<http://www.flrules.org/Gateway/reference.asp?No=RefXXXXX>) and are incorporated herein:

(a) through (f) No Change.

(g) Subsections referenced in Section 3.3.6 of the “Environmental Resource Permit Applicant’s Handbook, Volume I (General and Environmental)”, (June 1, 2018 ~~October 1, 2013~~) (<http://www.flrules.org/Gateway/reference.asp?No=Ref-09390>

~~<http://www.flrules.org/Gateway/reference.asp?No=Ref-05372>~~) incorporated by reference in paragraph 62-330.010(4)(a), F.A.C., ~~referenced in Section 3.3.6~~, as follows:

1. through 9. No change.

(3) No change.

(4) The ~~publications “Applicant’s Handbook for Water Use Permit Applications within the South Florida Water Management District” and forms~~ incorporated herein are available at no cost by contacting the South Florida Water Management District Clerk’s Office, 3301 Gun Club Road, West Palm Beach, FL 33406, 1\_(800)\_432-2045, ext. ~~6805 6436~~ or (561).682-~~6805 6436~~.

*Rulemaking Authority 373.044, 373.113, 373.118, 373.171, 373.216 FS. Law Implemented 373.042, 373.0421, 373.083, 373.109, 373.196, 373.219, 373.223, 373.224, 373.229, 373.232, 373.233, 373.236, 373.239, 373.250 FS. History—New 9-3-81, Formerly 16K-2.035(1), Amended 2-24-85, 11-21-89, 1-4-93, 4-20-94, 11-26-95, 7-11-96, 4-9-97, 12-10-97, 9-10-01, 12-19-01, 8-1-02, 6-9-03, 8-31-03, 4-23-07, 9-13-07, 2-13-08, 10-14-08, 7-2-09, 3-15-10, 3-18-10, 9-26-12, 10-23-12, 7-21-13, 7-14-14, 7-16-14, 9-7-15, \_\_\_\_\_.*

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