



WEST PALM BEACH

Mayor's Office

October 5, 2020

VIA EMAIL
cgoss@sfwmd.gov

Chauncey Goss
Governing Board Chairman
South Florida Water Management District
3301 Gun Club Road
West Palm Beach, Florida 33406

RE: City of West Palm Beach
EAA Reservoir Reservation Rulemaking Proposal

Dear Chairman Goss,

The City of West Palm Beach respectfully submits the following comments and suggested change to the South Florida Water Management District's (SFWMD) proposed Everglades Agricultural Area (EAA) Reservoir water reservation rule. The City has been an active participant in the EAA Reservoir water reservation rulemaking process. We appreciated SFWMD staff's willingness to consider our prior comments and concerns regarding the draft rule. However, now that the SFWMD Governing Board is scheduled to consider the proposed EAA Reservoir reservation at its October 8, 2020 meeting, the City would like to take this opportunity to express our ongoing concern regarding the reservation and to propose a possible solution for the Governing Board's consideration.

The City is the largest municipality in Palm Beach County with more than 110,000 residents. The City also 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 is committed to protecting its public water supply for the benefit of its citizens. The City is additionally committed to protecting environmentally sensitive features that are indirectly benefited by its water system. The City water system maintains water stages in Grassy Waters Preserve, a unique remnant of the Everglades. Grassy Waters Preserve is an ecologically critical wetland habitat for various threatened and endangered species including the endangered Everglades Snail Kite. The City's water system also helps maintain the Minimum Flows and Levels (MFL) for the Northwest Fork of the Loxahatchee River, a federally designated Wild and Scenic River.

In order to ensure a safe, reliable, and environmentally sustainable water supply source, the City directly relies upon surface water from the Central and Southern Florida Project (C&SF Project).

Given that this water supply is so essential to the City, both from a public health and safety and environmental perspective, we must remain vigilant when it comes to any proposals that may impact our use of the regional system. The City supports the Comprehensive Everglades Restoration Plan (CERP), which includes projects like the EAA Reservoir, that are intended to restore the Everglades and increase water supply for municipal and other water needs. It is in this context that we offer the following comments and proposed suggestions regarding the EAA Reservoir water reservation.

The City is concerned that as presently written the draft EAA Reservoir water reservation creates multiple uncertainties regarding the City's water supply system. The draft rule would reserve "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..." However, the proposed rule itself does not quantify the water that will be directed to Structures S-624, S-625, and S-626. In fact, the quantity to be reserved will not be known until the reservoir is constructed, at the earliest in 2027. Additionally, the final design and operation of the reservoir will be heavily influenced by the operating schedule for Lake Okeechobee, which is currently being reevaluated in the LOSOM 2022 process and could well change multiple times before the EAA Reservoir becomes operational. Therefore, as currently written, we do not know if one acre-feet or millions of acre-feet of water are being reserved by the proposed reservation, and the City is unable to determine what this reservation will do to its water supply system.

This uncertainty regarding the ultimate quantities and timing of discharges from the EAA Reservoir not only raises concerns regarding the City's ability to provide a reliable water supply for its citizens and the environment but also calls into question whether the directive complies with Section 373.223(4), Florida Statutes, which states that a reservation may not deprive existing legal uses of water. Along the same vein, the reservation calls into question whether the requirements of Section 601(h)(5) of the Water Resources Development Act of 2000 regarding protection of existing legal sources of water in relation to CERP (the Federal Savings Clause), and the requirements of Section 373.1501(5)(d), Florida Statutes will be met.

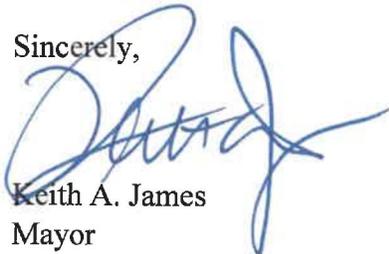
The City does not believe it would be in the public interest for the City and SFWMD to litigate over these issues, when the reservoir will not be constructed for at least 7 years and the relevant information is not yet available to the City or SFWMD. After all, the City and SFWMD serve the same taxpayers and it is never good policy for public entities to litigate using public funds when other opportunities are available to create a favorable outcome for both sides.

In this spirit, the City requests that the rule language be revised to provide that the current reservation will automatically be reviewed and replaced through a new rulemaking process once the EAA Reservoir is nearing completion. A copy of the City's proposed revision is attached as Exhibit "A" to this letter. This revision would allow SFWMD to move forward with development of the EAA Reservoir *and* provide all stakeholders with the assurance that before the EAA Reservoir actually becomes operational, they will be able to make an informed decision on the impact of the reservation. There is no reason that this provision cannot be included in the rule, as the rule will still provide the U.S. Army Corps of Engineers (Corps) and others assurance that all water discharged from the reservoir through the identified structures will be reserved, but will simply provide the City a clear point of entry to challenge the reservation should the actual facts

show a problem. Some may argue this solution is unusual or unworkable, but the Corps' Programmatic Regulations for CERP Project Cooperation Agreements specifically contemplate that CERP project reservations will be changed during the project construction and implementation process. 33 CFR § 385.27(c), Code of Federal Regulations. Likewise, Section 373.223(4), Florida Statutes requires that reservations be subject to period review *and revision* in light of changed conditions.

In closing, the City would urge the SFWMD Governing Board to favorably consider a solution that would allow this project to move forward, avoid unnecessary litigation and grant additional time to clarify this matter. We believe this solution will allow SFWMD, the City and other stakeholders to implement beneficial projects in a cooperative and non-confrontational manner.

Sincerely,



Keith A. James

Mayor

City of West Palm Beach

cc: SFWMD Governing Board Members
Don Medellin, Principal Scientist, SFWMD
Jennifer Brown, Esq., Senior Attorney, SFWMD
City of West Palm Beach City Commission Members
Kimberly Rothenburg, Esq., City Attorney
Ricardo Mendez-Saldivia, Assistant City Administrator
Poonam K. Kalkat, Director of Public Utilities

Attachment

Exhibit "A"

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

(1) - (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 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 contained in paragraph 40E-10.061(3)(a), F.A.C., above, and criteria in Section 3.11.6 of the Applicant's Handbook, incorporated by reference in Rule 40E-2.091, F.A.C. are interim, and must will be reevaluated, revised, and readopted at least one year before the EAA Reservoir is deemed operational pursuant to paragraph 40E-10.061(3)(b), F.A.C., above, 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. The reservation contained in paragraph 40E-10.061(3)(a), F.A.C., above, and criteria in Section 3.11.6 of the Applicant's Handbook, incorporated by reference in Rule 40E-2.091, F.A.C. shall no longer be effective upon the EAA Reservoir being deemed operational pursuant to paragraph 40E-10.061(3)(b), F.A.C., above, unless the District has initiated rulemaking to provide a replacement reservation to replace the interim reservation. If a petition is filed before the rule is adopted, challenging all or part of the proposed rule under Section 120.56, Florida Statutes, the interim rules shall remain effective until 100 days after a final determination of the validity or invalidity of the proposed rules adopting the replacement reservation. The interim rules in this subsection shall not be interpreted to diminish the quantity of water available to existing legal users or diminish existing levels of service for flood protection.

(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).

Note: Revisions are to the September 25, 2020 draft released by SFWMD.