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November 5, 2020

**VIA EMAIL AND  
FEDERAL EXPRESS**  
[dmedelli@sfwmd.gov](mailto:dmedelli@sfwmd.gov)

Don Medellin  
Principal Scientist  
South Florida Water Management District  
3301 Gun Club Road  
West Palm Beach, FL 33406

**Re: Everglades Agricultural Area Reservation Rule  
Lower Cost Regulatory Alternatives**

Dear Mr. Medellin,

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-021, 40E-10.031 and 40E-10.061, Florida Administrative Code (F.A.C.) and Notice of Proposed Rule regarding Rule 40E-2.091 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). Pursuant to Section 373.223(4), Florida Statutes, 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.

The freshwater to be reserved will be provided by the EAA Reservoir, as described in the Central Everglades Planning Project (CEPP). The source of water for the EAA Reservoir will be EAA basin runoff and water discharged from Lake Okeechobee. The water to be reserved will not be available for protection of fish and wildlife until the EAA Reservoir is fully constructed and operational. Additionally, the water to be reserved assumes a continuation of the 2008 Lake Okeechobee Regulation Schedule (LORS) with refinements that are beyond the schedule's current flexibility. Modifications to LORS 2008 would be required to optimally utilize the storage capacity of the EAA Reservoir. Under some hydrologic conditions, LORS 2008 would result in storage of water that would otherwise be discharged to the EAA Reservoir in order to optimize system-wide performance and ensure compliance with Savings Clause Requirement. Finally, the EAA Reservoir will not be completed until after the United States Corps of Engineers (Corps) replaces LORS 2008 with the Lake Okeechobee System Operating Manual (LOSOM), which is expected to be completed by the end of 2022. LOSOM

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2022 will likely impact the releases from Lake Okeechobee to the EAA Reservoir, as contemplated in the supporting documents.

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 water system also maintains water stages in Grassy Waters Preserve, a unique remnant of the Everglades and helps maintain the Minimum Flow and Level (MFL) for the Northwest Fork of the Loxahatchee River, a federally designated Wild and Scenic River. The City withdraws and uses surface water from Lake Okeechobee for its potable water system pursuant to a long-standing Water Use Permit 50-00615-W issued by SFWMD. Lake Okeechobee is one of the sources of water for the EAA Reservoir that will be prospectively reserved according to the Proposed Rule. Additionally, the City's use of water from Lake Okeechobee is adversely impacted by LORS 2008, which is one of the assumptions supporting the Proposed Rule and any modifications to LORS 2008 that would be required to optimally utilize the storage capacity of EAA Reservoir, as assumed by the Proposed Rule, will impact the City. Therefore, the City is "substantially affected," by the Proposed Rule.

In accordance with Section 120.54(3)(c), Florida Statutes, the City respectfully requests a public hearing before the SFWMD Governing Board regarding the Proposed Rule in order to give all affected persons such as the City the opportunity to present evidence and argument on all issues under consideration. We thank you in advance for your compliance with the applicable law.

Sincerely yours,

de la Parte & Gilbert, P. A.



Edward P. de la Parte, Jr.

Enclosure

cc: SFWMD Governing Board  
Drew Bartlett, Executive Director, SFWMD  
Toni Edwards, Senior Scientist, SFWMD  
Jennifer Brown, Esq., Senior Attorney, SFWMD  
Kimberly Rothenburg, Esq., City Attorney  
Ricardo Mendez-Saldivia, Assistant City Administrator  
Poonam K. Kalkat, Director of Public Utilities

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The freshwater to be reserved will be provided by the EAA Reservoir, as described in the Central Everglades Planning Project (CEPP). The source of water for the EAA Reservoir will be EAA basin runoff and water discharged from Lake Okeechobee. The water to be reserved will not be available for protection of fish and wildlife until the EAA Reservoir is fully constructed and operational. Additionally, the water to be reserved assumes a continuation of the 2008 Lake Okeechobee Regulation Schedule (LORS) with refinements that are beyond the schedule's current flexibility. Modifications to LORS 2008 would be required to optimally utilize the storage capacity of the EAA Reservoir. Under some hydrologic conditions, LORS 2008 would result in storage of water that would otherwise be discharged to the EAA Reservoir in order to optimize system-wide performance and ensure compliance with Savings Clause Requirement. Finally, the EAA Reservoir will not be completed until after the United States Army Corps of Engineers (Corps) replaces LORS 2008 with the Lake Okeechobee System Operating Manual (LOSOM), which is expected to be completed by the end of 2022.

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LOSOM 2022 will likely impact the releases from Lake Okeechobee to the EAA Reservoir, as contemplated in the supporting documents.

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In accordance with Section 120.541(1)(a), Florida Statutes, the City submits the following good faith written proposal for lower cost regulatory alternatives to the Proposed Rule. Upon submission of this letter, SFWMD shall prepare a statement of estimated regulatory costs (SERC), as provided in Section 120.541(2), Florida Statutes. Additionally, the City specifically requests that SFWMD adopt the alternatives listed below or provide a statement in the SERC of the reasons for rejecting all the alternatives in favor of the Proposed Rule.

**Alternative No. 1 - No Adoption of Proposed Rule**

The City requests that SFWMD adopt the alternative of not approving the Proposed Rule. According to Section 120.541(1)(a), Florida Statutes, a good faith written proposal for a lower cost regulatory alternative may include the alternative of not adopting the rule, if the proposal explains how the lower costs and the objectives of the law will be achieved by not adopting the rule. The City believes this proposal meets those requirements.

Sections 601(h)(2)(A) and 601(h)(4)(A)(iii)(V) of the Water Resource Development Act (WRDA) of 2000 require water identified in a project implementation report be reserved or allocated for the natural system by the State of Florida. Similarly, Section 373.470(3)(c), Florida Statutes requires that each project implementation report identify the increase in water supplies resulting from a CERP Project and such additional water supply shall be allocated or reserved by SFWMD. Section 601(h)(4)(B)(iii) prohibits the Secretary from executing a project cooperation agreement until the reservation or allocation identified in the project implementation report is executed under State law.

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Further guidance is provided by the Programmatic Regulations adopted by Corps pursuant to WRDA 2000 and the Guidance Memorandums adopted by the Corps pursuant to the Programmatic Regulations. 33 CFR 385.5. The Programmatic Regulations provide that prior to execution of a Project Cooperation Agreement, “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 Implementation Report.**” (Emphasis added). 33 CFR 385.27(b). 33 CFR 385.27(c) prohibits SFWMD from unilaterally modifying the reservation or water allocation set forth in a project implementation report. Similarly, Section 4.8 of Guidance Memorandum No. 4 (Identifying Water Made Available for the Natural System and for 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).

According to Section 373.4598(1)(d), Florida Statutes, if SFWMD implements the EAA Reservoir as a project component, as is the case with the Proposed Rule, then “**the district must abide by all applicable state and federal laws relating to such project.**” (Emphasis added). WRDA 2000, the Corps’ Programmatic Regulations, and Guidance Memorandum No. 4 all clearly state that SFWMD may only adopt the reservation or allocation of water specifically identified in the project implementation report for the EAA Reservoir Reservation. SFWMD cannot adopt a reservation or allocation not identified in the project implementation report without following the process set forth in 33 CFR 385.27(c).

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).<sup>1</sup> 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)<sup>2</sup> and the Central and Southern, Florida 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 assurance language for the EAA Reservoir and SFWMD has not followed the process set forth in 33 CFR 385.27(c) to modify the language set forth in these reports!**

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<sup>1</sup> The Central and Southern Florida Project Comprehensive Everglades Restoration Plan – Central Everglades Planning Project – State Compliance Report dated December 2014 (EAA 2014 State Compliance Report) is incorporated in Annex B to the EAA PIR.

<sup>2</sup> The Central Everglades Planning Project Post Authorization Change Report – State Compliance Report Section 373.1501, Florida Statutes dated February 2018 (EAA 2018 State Compliance Report) is incorporated in Annex B to the CEPP PACR.

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Annex B to the EAA PIR identifies the water made available by the project and sets forth the reservation or allocation of water language recommended to preserve the project benefits. Section B.4.3.1 titled “Water to be Reserved or Allocated for the Natural System,” specifically provides, “The SFWMD will protect the water made available by the CEPP project features using its reservation or allocation authority as required by 373.470, Florida Statutes.” The language recommended for protecting the water made available by the project is identified in Section 7.2 – Water to be Reserved or Allocated for the Natural System of the EAA 2014 State Compliance Report, which states:

As required by Paragraph 373.470(3)(c ), F.S., the implementation of the CERP, the water made available by the project will be protected using the State of Florida's reservation or allocation authority under state law. The SFWMD has protected the water for the natural system in the Holey Land and Rotenberger Wildlife Management Areas; WCA 1, WCA 2A, WCA 2B, WCA 3A, and WCA 3B; and ENP through the Restricted Allocation Area Rule for the Everglades and North Palm Beach/Loxahatchee River Watershed Waterbodies, which was adopted in 2007.

In February 2007, the SFWMD Governing Board adopted restricted allocation area criteria for the Everglades and Loxahatchee River Watershed water bodies (Section 3.2.1.E, Basis of Review). This criterion limits allocations to conditions or withdrawals in the Lower East Coast Service Area and North Palm Beach County/Loxahatchee River Watershed, depending on the specific use class that existed as of April 1, 2006, known as the “base condition water use.” The rule only allows allocations over the “base condition water use” through alternative source development, implementation of offsets (e.g., recharge barriers and recharge trenches), or identification of terminated or reduced water uses that existed as of April 1, 2006. Wet season water can be allocated if the permit applicant demonstrates that such flows are not needed for restoration of the Everglades pursuant to CERP or for the Loxahatchee River Watershed water bodies, pursuant to the *Northern Palm Beach County Comprehensive Water Management Plan*. Otherwise, water in the Everglades and the Northwest Fork of the Loxahatchee River water bodies or their integrated conveyance systems that are hydraulically connected including primary canals of the C&SF Project and related secondary and tertiary canals cannot be allocated for consumptive uses. By limiting allocations, restricted allocation area criteria function similar to a water reservation rule that also limit allocations.

**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

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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).

Annex B to the CEPP PACR<sup>3</sup> and Annex B to the EAA EIS both identify the water made available by the project and sets forth the reservation or allocation of water language recommended to preserve the project benefits. Section B.3.3.1 titled “Water to be Reserved or Allocated for the Natural System,” specifically provides, as follows:

As required by Section 601(h)(4)(A) of the WRDA 2000 and Section 385.35 of the Programmatic Regulations for the Implementation of CERP, the water made available by the project will be protected using the State of Florida's reservation or allocation authority under state law as is represented by Table B-9. Water made available by the TSP must be protected before the SFWMD and the Department of the Army enter into one or more Project Partnership Agreements to construct the TSP project features. The SFWMD has already protected the pre-project water for the natural system in the Holey Land and Rotenberger Wildlife Management Areas; WCA 1, WCA 2A, WCA 2B, WCA 3A and WCA 3B; and ENP through the restricted allocation criteria for the Everglades and Northern Palm Beach/Loxahatchee River Watershed waterbodies. See Section 3.2.1 of the SFWMD's Applicant's Handbook (Applicant's Handbook) for Water use Permit Applications within the South Florida Water Management District.

Lake Okeechobee was adopted as a minimum flow and minimum water level (MFL) waterbody by the SFWMD. MFLs are the minimum flow or minimum water level at which further withdrawals would be significantly harmful to the water resources or ecology of the area. The LORS08 analysis revealed that the anticipated lower lake stages would turn Lake Okeechobee into a MFL waterbody in recovery. As part of the recovery strategy while LORS08 is in effect, the District adopted restricted allocation criteria for LOSA. The criteria limit users' withdrawals to their base condition water use. See Section 3.2.1 of the Applicant's Handbook. Applicants are not authorized to use additional volumes from Lake Okeechobee waterbodies unless they identify one of the specified sources listed in the rule. Furthermore, the SFWMD does not anticipate LOSA users requesting increases in allocation because they already have consumptive use permits with allocations to satisfy their 1-in-10 demand for existing crops.

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<sup>3</sup> The same recommendation is contained in Section 7.2 of the EAA 2018 State Compliance Report.

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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 and the Lake Okeechobee MFL. None of these reports indicate that this water will be protected through a water reservation adopted pursuant to Section 373.223(4), Florida Statutes. Further, SFWMD has not followed the process set forth in 33 CFR 385.27(c) to modify this project commitment. Therefore, pursuant to Section 373.4598(1)(d), Florida Statutes, SFWMD must follow federal law with regards to water made available by the EAA Reservoir by relying on its existing restricted allocation rules and the Lake Okeechobee MFL to protect this water. Thus, SFWMD is legally prohibited from using its reservation authority under Section 373.223(4), Florida Statutes to adopt the Proposed Rule.

Even if SFWMD is not required to rely on its existing restricted allocation rules and the Lake Okeechobee MFL to protect the water made available by the EAA Reservoir, the EAA Reservoir Reports indicate that SFWMD's existing rules can meet the existing objectives of federal and state law. In other words, a Section 373.223(4) reservation is not required to meet the objectives of the law. This is further supported by prior action by the Corps and SFWMD. Section 2.9 of the Broward County Water Preserve Areas Project Agreement provides that protection of water made available by the Broward County Preserve Area and the C-111 Spreader Canal Projects can be protected by the allocation rules adopted by SFWMD in 2007, which prohibits utilization of water in the Everglades including the Water Conservation Areas and Everglades National Park and its connected conveyance systems. In Exhibit A to the Agreement, SFWMD states:

For the Broward County Water Preserve Area and C-111 Spreader Canal Western Projects, an allocation rule adopted in 2007 prohibits the utilization of water in the Everglades including the Water Conservation Areas and Everglades National Park, and its connected conveyance systems creating a regional Restricted Allocation Region. It prevents allocation of natural system water needed for these two projects. This allocation area rule also provides protection for surface and groundwater flowing to Biscayne Bay. **Rules promulgated to protect water for the natural system under either the reservation or allocation authority have the same purpose – to protect water from allocation for consumptive uses.**

(Emphasis added). The use of rules promulgated to protect the natural system in lieu of a reservation rule was accepted by the Corps in Exhibit A as meeting the requirements of WRDA 2020.

In conclusion, the references cited above indicate the objectives of federal and state law can be met through use of SFWMD's existing restricted allocation rules and the Lake Okeechobee MFL. Consequently, adoption of a reservation under Section 373.223(4), Florida



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Statutes is unnecessary. Also, it is intuitive that not adopting the Proposed Rule will result in lower costs, when compared to the option of adopting the Proposed Rule, if SFWMD relies on its existing rules to provide the assurances required under WRDA 2000. Thus, SFWMD must accept the alternative of not adopting the Proposed Rule.

**Alternative No. 2 - Transition Rulemaking Provision**

The City requests that the Proposed Rule be revised to provide that the prospective reservation will be automatically reviewed and replaced through a new rulemaking process once the EAA Reservoir is nearing completion. The good faith lower cost regulatory alternative would require the following changes to Rule 40E-10.061, as follows:<sup>4</sup>

**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 annual average water year (May-April) (see Figure 3-7), thereby increasing existing flows on an 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, 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 pursuant to paragraph 40E-10.061(3)(a), F.A.C., above and

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<sup>4</sup> All changes are to the Notice of Proposed Rule draft published in the Florida Administrative Register dated October 16, 2020. The proposed rule revisions were accepted so that the underlined and struck through language only reflect the changes suggested by the City.

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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 new reservation to replace the interim reservation. If a petition is filed before the new reservation rule is adopted, challenging all or part of the proposed rule under Section 120.56, Florida Statutes, the interim 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, shall remain in effect until after a final determination the rule is invalid or, if the rule is determined to be valid, until the new reservation rule is adopted.

(d) Water released from the EAA Reservoir through structure S-628 is not reserved. Model simulation of the draft operating protocol predict the EAA Reservoir, together with the 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).

Modification of the Proposed Rule is contemplated under the EAA Reservoir Reports and is authorized under state and federal law. The EAA Reservoir Reports indicate that the source of water for the EAA Reservoir will be the EAA basin runoff and water currently discharged from Lake Okeechobee. The water to be reserved will not be available for protection of fish and wildlife until the EAA Reservoir is constructed and operational. According to the EAA Reservoir Reports, the water made available from the EAA Reservoir Project for the natural system assumes continuation of LORS 2008 with refinements that are beyond the schedule's current flexibility. However, since the EAA Reservoir will not be completed until approximately 2027, it will be subject to the new LOSOM 2022 or some variation thereof and not LORS 2008. The new regulation schedule will likely impact releases from Lake Okeechobee to the EAA Reservoir and a modification of the prospective reservation will be required. In fact, the current version of Paragraph 40E-10.061 in the Proposed Rule indicates the reservation will be revised before the EAA Reservoir is deemed operational.

The proposed alternative simply describes how SFWMD will transition from the current reservation to the new reservation once the EAA Reservoir becomes operational. It sets forth a process requiring SFWMD to re-initiate rulemaking to adopt the new reservation and provides language that would maintain the existing reservation in place until the new rule is adopted. The only real difference between the existing language and the City's proposal is that the new language clarifies that the existing reservation ceases to exist, if the replacement reservation is found to be legally invalid under Section 120.56, Florida Statutes. However, this result is implicit under the existing Proposed Rule. If SFWMD is committed to revising the existing reservation once the EAA Reservoir was deemed operational, then the new reservation will terminate once the new rule is adopted. Also, since it is possible under Section 120.56, Florida Statutes to challenge an existing rule, it is always possible that the existing

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reservation could be invalidated prior to adoption of the new rule. Thus, the new proposed language simply takes the guess work out of the future rule adoption process.

SFWMD staff has contended that the Corps would never accept a reservation that could be terminated in the future leaving the water made available by the project unprotected. However, as previously explained, that potential exists with regards to every reservation adopted by SFWMD for a CERP project. Just because a prospective reservation is adopted without challenge or, if challenged, is found to be valid, does not mean that the reservation is then somehow cast in concrete so to speak. Section 120.56, Florida Statutes allows challenges to existing rules, as well as proposed rules, and it is always possible that a challenge to an existing reservation would be successful. Thus, concern alluded to by SFWMD staff exists whether or not this proposed alternative is accepted.

However, in any case, state and federal law specifically contemplate that reservations can change and have created a process for modifying reservations. Attachment 4-B of Guidance Memorandum No. 4 (Identifying Water Made Available for the Natural System and for Other Related Needs) provides in pertinent part as follows:

The CERP project reservation or allocation will identify water made available by the project, which is in part based on project operations in concert with other existing CERP and non-CERP projects and conditions. For this reason, the project reservation or allocation will be appropriately conditioned to account for circumstances when such related projects and conditions are not realized as anticipated. This may result in the need to revise the project reservation or allocation based on unanticipated circumstances.

Pursuant to section 601 of WRDA 2000, CERP reservations or allocations for a specific project must be executed prior to entering into the PCA for the project. **However, reservations or allocations are subject to periodic review based on changed conditions, such as changes that will occur in the C&SF Project as Plan projects become operational. This provides flexibility to account for changes in implementation strategies, restoration objectives and contingency plans during the life of the project.**

(Emphasis added). The Programmatic Regulations state that a change to a reservation and allocation will only require an amendment to the Project Cooperation Agreement. 33 CFR 385.27(c). This amendment can be accomplished if the District Engineer in consultation with SFWMD, the Florida Department of Environmental Protection, the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida and other Federal, State and local agencies verifies that the revised reservation or allocation continues to provide for an appropriate quantity, timing and distribution of water dedicated and managed for the natural system after considering any changed circumstances or new information since completion of

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the EAA Reservoir Reports. Thus, the alternative proposal recommended by the City does not conflict with state or federal law.

This proposal will result in lower costs than the existing language in the Proposed Rule as it removes any incentive to challenge the Proposed Rule before the EAA Reservoir is constructed and the actual quantity of water made available by the project is known. This will result in a reduction in costs to SFWMD and other local government entities such as the City that would be incurred in implementing and enforcing the Proposed Rule. *See* §120.541(2)(c), Fla. Stat. The City is confident that other cost savings will be realized, if this alternative were implemented.

### **Alternative No. 3 - Reservation Limited to Quantity of Water Identified in EAA Reservoir Reports**

Paragraph 40E-10.061(3)(a), F.A.C. of the Proposed 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, that is not a legally permissible means of expressing the water made available by the EAA Reservoir that is to be allocated or reserved. According to Section 4.7 of Guidance Memorandum No. 4 (Identifying Water Made Available for the Natural System and for Other Related Needs), the water to be reserved or allocated for the natural system will be identified using the appropriate difference between the volume-probability curve for the Initial Operating Regime and the Existing Conditions Baseline using the methodology set forth in Section 4.6.2.1, which provides in pertinent part as follows:

The total water necessary to achieve the benefits of the project and water made available for the basins in the Everglades category (i.e., Water Conservation Area 1, Water Conservation Area 2, Water Conservation Area 3, Big Cypress National Preserve and Everglades National Park) is to be identified. Inflow volumes for the Existing Conditions Baseline, the Initial Operating Regime, the Next-Added Increment Baseline, and the Next Added Increment Condition will be computed and displayed as described in Section 4.6.1.

From analysis of the inflows, volume-probability curves and difference curves that are generated, a summary table can be prepared displaying the locations as rows and the differences between the IOR and Existing Conditions Baseline and the difference between the Next-Added Increment Baseline and the Next-Added Increment Condition as columns for the 10% exceedance probability, 50% exceedance probability, and 90% exceedance probability....

As stated previously, Section 373.4598(1)(d), Florida Statutes requires SFWMD to “abide by all applicable state and federal laws” relating to the EAA Reservoir. Thus, Paragraph 40E-10.061(3)(a), F.A.C. must be modified to correctly describe the water that is being reserved.

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Those probability curves are contained in the EAA Reservoir Reports and have been expressed as allowing for 370,000 acre-feet of additional water on average annually over the existing condition to be delivered to the Central Everglades.

The City requests that the Proposed Rule be revised to correctly describe the water being reserved as set forth in the EAA Reservoir Reports. The good faith lower cost regulatory alternative would require the following changes to Rule 40E-10.061, as follows: <sup>5</sup>

**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) as described by the volume probability curves at the 10% exceedance probability, the 50% exceedance probability and the 90% exceedance probability at Water Conservation Area 3, the Everglades National Park and Florida Bay specified in the table below (see Figure 3.7) is reserved from allocation. This quantity of surface water can be expressed as 370,000 acre-feet of additional water on average annually over the existing condition to be delivered to the Central Everglades.

(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 annual average water year (May-April) (see Figure 3-7), thereby increasing existing flows on an 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.~~

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<sup>5</sup> All changes are to the Notice of Proposed Rule draft published in the Florida Administrative Register dated October 16, 2020. The proposed rule revisions were accepted so that the underlined and struck through language only reflect the changes suggested by the City.

(d) Water released from the EAA Reservoir through structure S-628 is not reserved. Model simulation of the draft operating protocol predict the EAA Reservoir, together with the 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).

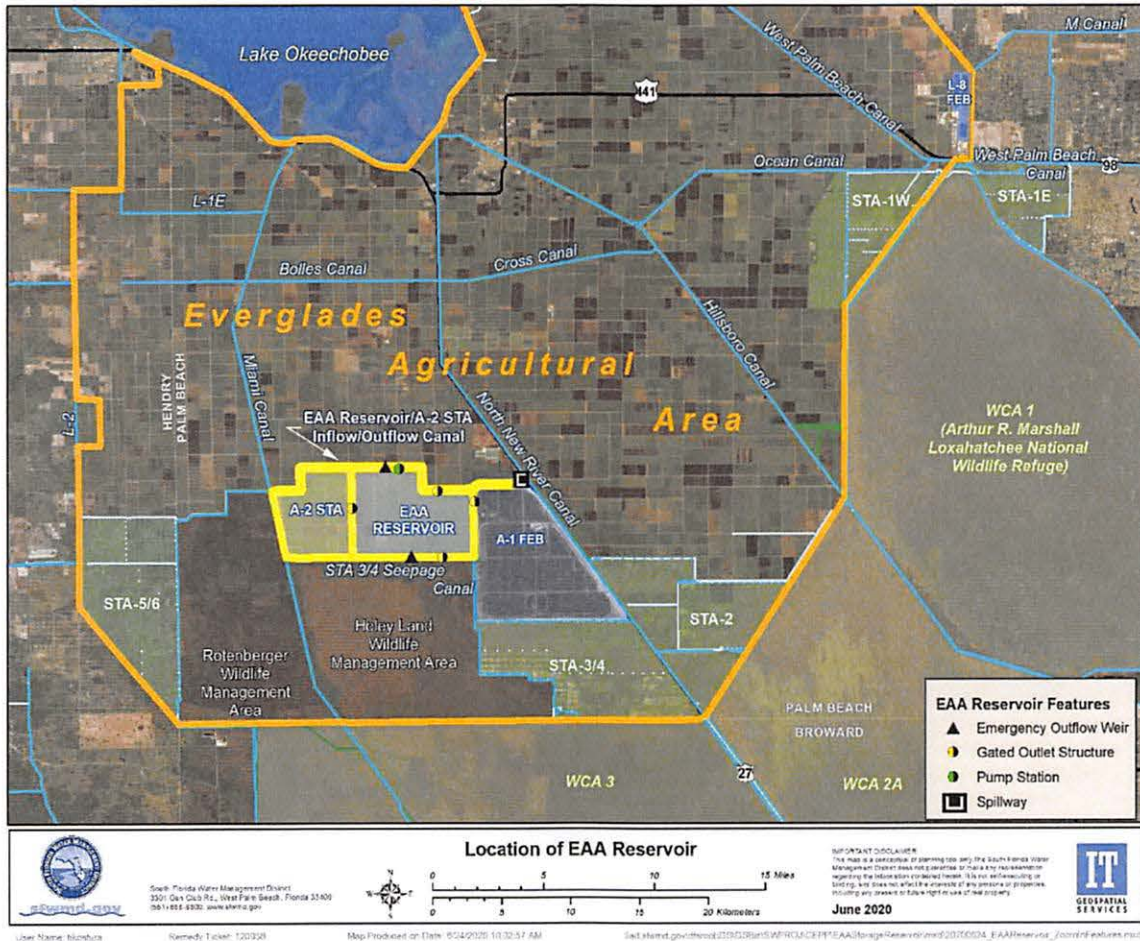


Figure 3-5. Location of the EAA Reservoir.

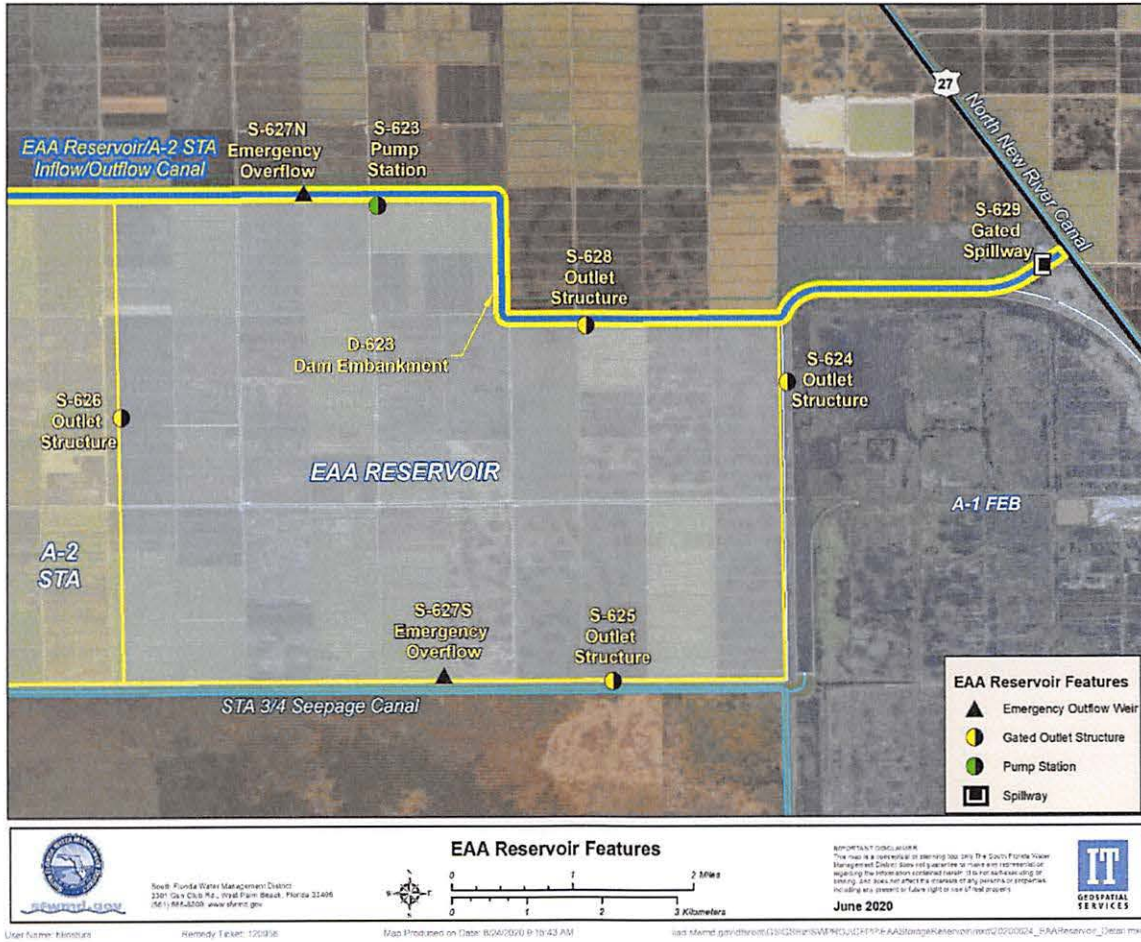


Figure 3-6. Key Features of the EAA Reservoir.

Water Made Available by the Project (difference between TSP and EARFWO)			
Location	Water Made Available equaled or exceeded 10% of Water Years (1,000 ac-ft)	Water Made Available equaled or exceeded 50% of Water Years (1,000 ac-ft)	Water Made Available equaled or exceeded 90% of Water Years (1,000 ac-ft)
WCA 3	182	58	-13
ENP	214	62	-7
Florida Bay	193	58	-5

Figure 3-7. Water Reserved by the Project.

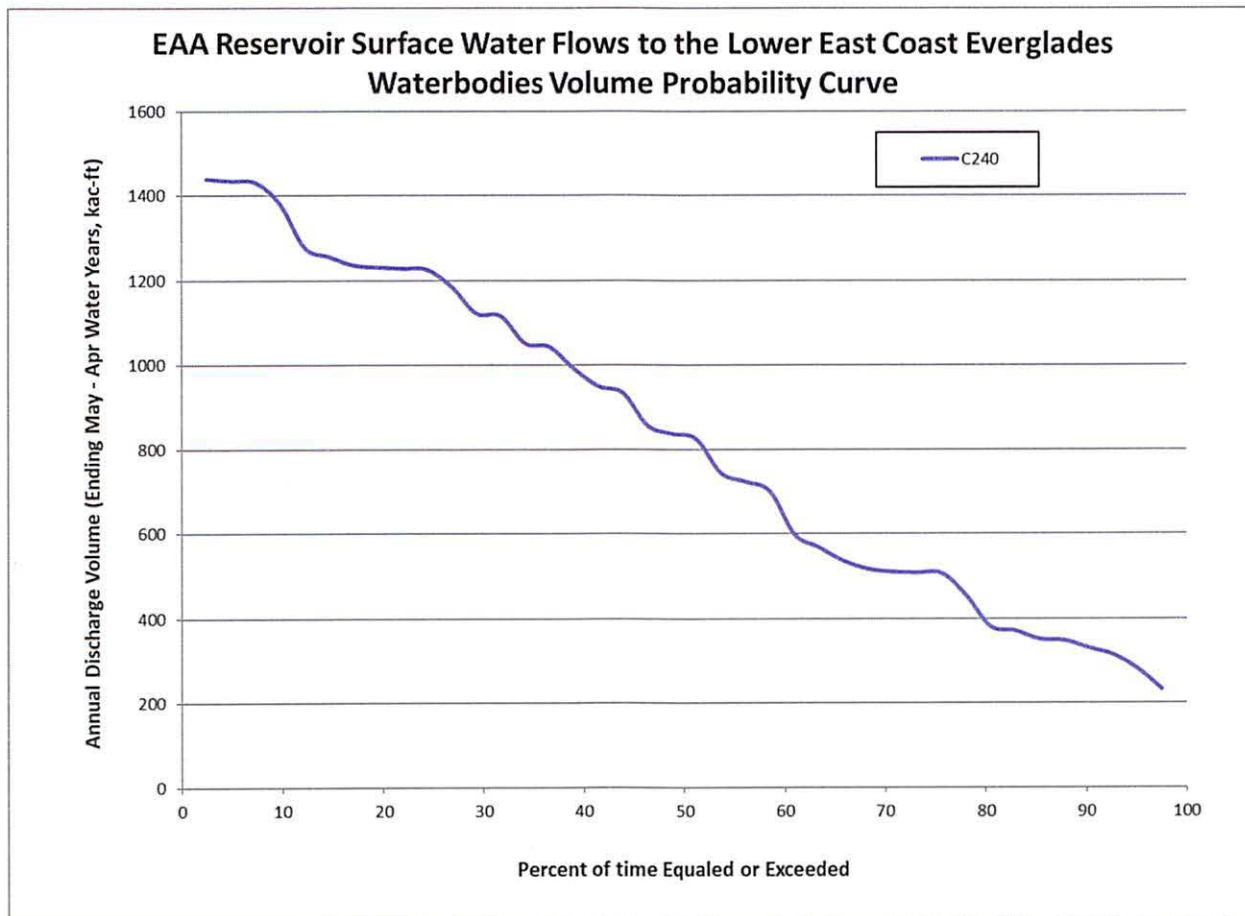


Figure 3-7. EAA Reservoir annual surface water discharges through structures S-624, S-625, and S-626 volume probability curve (May-April water year) from the Alternative C240 model simulation.



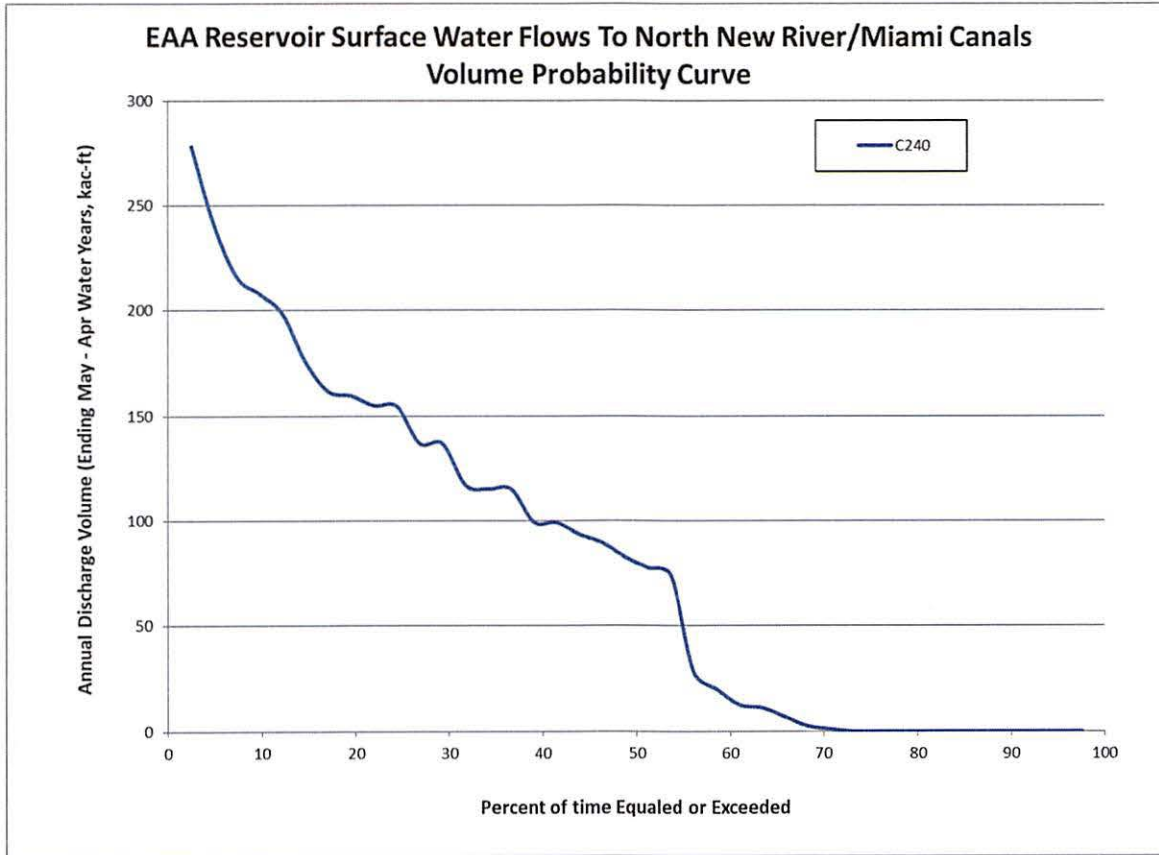


Figure 3-8. EAA Reservoir annual surface water discharges through structure S-628 volume probability curve (May-April water year) from the Alternative C240 model simulation.

This proposal is a lower cost regulatory alternative because it only reserves the quantity of water identified in the EAA Reservoir Reports and not “all” the surface water could be released from the project under current, modeled or future conditions, as is the case with the Proposed Rule. Since all the water surface water that could be released by operation of the EAA Reservoir is not being reserved, the impact to existing legal users such as the City will be less, which means the costs identified in Section 120.541(2), Florida Statutes will not be as high as those imposed by the Proposed rule.

**Alternative No. 4 - Protection of Existing Legal Source and Existing Legal Uses of Water**

Section 373.4598(1)(d), Florida Statutes requires SFWMD to “abide by all applicable state and federal laws” relating to the EAA Reservoir. Section 601(h)(5) of WRDA 2000 states that “Until a new source of water supply of comparable quantity and quality as that available on the date of enactment of this Act is available to replace the water to be lost as a result of implementation of the Plan, the Secretary and the non-Federal sponsor [SFWMD] shall not eliminate or transfer existing legal uses of water, including those for... (i) an agricultural or urban water supply; (ii) allocation or entitlement to the Seminole Indian Tribe of Florida

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under section 7 of the Seminole Indian Land Claims Settlement Act of 1987 (25 U.S.C. 1772e); (iii) the Miccosukee Tribe of Indians of Florida; (iv) water supply for Everglades National Park; or (v) water supply for fish and wildlife.” According to Section 3.4 of Guidance Memorandum No. 3 (Savings Clause Requirements), the term “existing legal source” is unique to Section 601 of WRDA 2000 and is not defined in State or Federal law and pursuant to the Programmatic Regulations, the following definition of existing legal source is adopted for CERP:

Existing legal source means the quantity and quality of water available within a water basin (including seepage, surface water, direct rainfall and groundwater) used for water supply, which is legally protected by Federal or State law, including the quantity and quality necessary for protection of the source of supply consistent with State and Federal law, as of December 11, 2000 for:… (i) An agricultural or urban water supply; (ii) Allocation or entitlement to the Seminole Tribe of Florida under Section 7 of the Seminole Indian Lands Claim Settlement Act of 1987 (25 U.S.C. 1772e); (iii) the Miccosukee Tribe of Florida; (iv) water supply for Everglades National Park; or (v) water supply for fish and wildlife.

Thus, existing legal water sources, such as the City’s water system, are protected when setting prospective reservations for CERP projects.

Florida law offers similar protection to existing legal uses of water, such as the City’s permitted use of water. First, Section 373.1501(5)(d), Florida Statutes provides that in implementing CERP, SFWMD must “provide reasonable assurance that the quantity of water available to existing legal users shall not be diminished by implementation of project components so as to adversely impact existing legal users, that existing levels of service for flood protection shall not be diminished within the geographic area of the project component, and that water management practices will continue to adapt to meet the needs of the restored natural environment.” Second, Section 373.223(4), Florida Statutes provides that when setting reservations “all presently existing legal uses of water shall be protected so long as such use is not contrary to the public interest.”

Although not a CERP Project, SFWMD followed these requirements with regards to the Kissimmee River Reservation Rule that is scheduled to be approved by the Governing Board on November 12, 2020. The latest version of that rule includes language excluding from the proposed reservation the following:

3. A permit modification or renewal involving a Direct Withdrawal of Surface Water or an Indirect Withdrawal of Groundwater that does not change the source, increase the allocation or change the withdrawal location (e.g., replacement of an existing well or surface water pump with similar construction and at a similar location); that includes crop

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changes that do not change the allocation; or results in a decrease in permit allocation.

4. Re-allocation or transfer of a water use permit involving a Direct Withdrawal of Surface Water or an Indirect Withdrawal of Groundwater issued: a) before [rule effective date] if the previous permitted demonstrated such use complied with the criteria in Section 3.1 through 3.10 of the Applicant's Handbook; or b) after [rule effective date] if the previous permittee demonstrated compliance with the criteria in Subsection 3.11.5 of the Applicant's Handbook.

Kissimmee River Reservation Rule (10/21/2020), Section 3.11.5 of the Applicant's Handbook.

The City requests that Section 3.11.6 of the Applicant's Handbook in the Proposed Rule be revised to correctly implement the more protective language, as follows:<sup>6</sup>

**Applicant's Handbook**

3.11.6 EAA Reservoir

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

1. A permit modification or renewal involving the use of water required for operation of the Everglades Agricultural Area Reservoir that does not change the source, increase the allocation or change the withdrawal location (e.g., replacement of an existing well or surface water pump with similar construction and at a similar location); that includes crops changes that do not change the allocation; or that results in a decrease in permit allocation.
2. Re-allocation or transfer of a water use permit involving the use of water required for operation of the Everglades Agricultural Area Reservoir issued: a) before [rule effective date], if the previous permittee

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<sup>6</sup> All changes are to the Notice of Proposed Rule draft published in the Florida Administrative Register dated October 16, 2020. The proposed rule revisions were accepted so that the underlined and struck through language only reflect the changes suggested by the City.

demonstrated such use complied with the criteria in Sections 3.1 through 3.10 of the Applicant's Handbook.

3. Applications deemed complete before the conditions identified in Sub-section 40E-10.061(3)(a), F.A.C. occur, and which otherwise satisfy the requirements of Chapter 40E-2, F.A.C., as applicable.

The City believes these revisions that come directly from the proposed Kissimmee River Reservation Rule are in better alignment with the applicable law and will reduce the costs associated with the rule.

### **Conclusion**

The City specifically requests that SFWMD adopt these lower cost regulatory alternatives in lieu of the Proposed Rule and prepare a SERC pursuant to the requirements of Section 120.541, Florida Statutes. We thank you in advance for your compliance with the applicable law.

Sincerely yours,

de la Parte & Gilbert, P. A.



Edward P. de la Parte, Jr.

### Enclosure

cc: SFWMD Governing Board  
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Poonam K. Kalkat, Director of Public Utilities