

**SEFLUC  
Regulatory Update  
December 14, 2020 Meeting**

**Updates**

**USACE’s Development of New Lake Okeechobee 2022 Regulation Schedule**

- **NOTE: See Continuing to Monitor Section Below for Additional Background Information**
- **Project purposes** - flood control, water supply, recreation, navigation and environmental effects to fish and wildlife, cultural and recreational resources.
- Updated Lake Okeechobee System Operating Manual (LOSOM) and accompanying Environmental Impact Statement
- **Announced USACE Schedule:**

<b>Public Scoping/Plan Formulation</b>	Feb. – Sept. 2019
<b>Public Workshops/Alternative Evaluation</b>	Oct. 2019 – Sept. 2021
<b>Prepare Draft LOSOM/EIS</b>	Oct. 2021 – Jan. 2022
<b>Public Comment on LOSOM/EIS</b>	Feb – Mar. 2022
<b>Prepare Final LOSOM/EIS</b>	Apr. – May 2022
<b>Final LOSOM/EIS</b>	June 2022
<b>Signed Record of Decision</b>	September 2022

- **Project Delivery Team Meetings:**
  - USACE is using a Pareto analysis to identify potential schedules that take into consideration authorized project purposes
  - Using LORS 2008 as baseline
  - Most recent PDT meeting held November 20, 2020 regarding conceptual plan modeling and evaluation process
  - Does not presume Savings Clause applies to analysis
- **Savings Clause Issue** - USACE has announced that it does not believe the WRDA 2000/CERP “savings clause” applies in the LOSOM process
  - SEFLUC submitted a comment letter to USACE on January 30, 2020, with copies to SFWMD, objecting to failure to apply savings clause in the LOSOM process.
    - WRDA 2000 and CERP adopted with clear understanding that existing legal water uses would be protected, and SFWMD would implement existing water supply planning and regulation

- Savings clause applies to any project implementing CERP, which LOSOM will do
- Florida law also protects existing water users, and SFWMD is tasked with protecting these guarantees
- Potential to address/clarify Savings Clause issue in WRDA 2020 bill currently in Congress

### **Water Resources Development Act 2020 and LOSOM**

- Act passed House of Representatives on July 29, 2020
- Includes provision regarding evaluating the implications of evaluate the implications of prohibiting releases from Lake Okeechobee through the S-308 and S-80 lock and dam structures on the operation of the lake in accordance with authorized purposes and seek to minimize unnecessary releases to coastal estuaries
- Does not authorize any new purpose for management of Lake Okeechobee or authorize USACE to affect any existing authorized purpose
- Amendments requiring consideration of HABs in connection with project purposes were not approved
- The conference report was released on or about December 7. The House voted on the report this week and the Senate is scheduled to vote on it later this month. Unless something unforeseen occurs, it should pass this year.

### **USACE Proposed LORS 2008 Deviation**

- On August 6, 2019 the USACE posted notice on the Jacksonville District's web site of proposed changes to the LORS 2008 regulation schedule. The purpose of the deviation is to allow the USACE to suspend the current regulation schedule when harmful algal blooms (HABs) are present.
- In 2019 SEFLUC prepared and submitted a letter objecting to the proposed deviation, explaining the issues with the proposed deviation, and recommending that a full EIS be completed to evaluate the full impact of any proposed deviation.
- In 2019 Comment letters were submitted by FDEP, Lake Worth Drainage District, Martin County, SFWMD, Florida Cattleman's Association, Audubon of Florida, the Palm Beach County Economic Council, Florida Inland Navigation District, the Nature Conservancy, Palm Beach County, Florida Crystals, the Lake Okeechobee Anglers, FDACS, Seminole Tribe of Florida, U.S. Sugar and the City of West Palm Beach.
- USACE has prepared a revised supplemental Environmental Assessment responding to comments received in response to the 2019 LORS Planned Deviation Environmental Assessment
  - See: <https://www.saj.usace.army.mil/Deviations/> for information regarding planned deviation
  - Additional modeling conducted with Lake Okeechobee Operations Screening Model including effects on water supply

- **SEFLUC submitted detailed comments concerning proposed deviation**
  - USACE lacks authority to implement 2020 deviation
  - Deviation would grant USACE unbridled discretion to ignore existing LORS
  - LOOPS model not appropriate for evaluation of harm of deviation to water supply
  - No evidence deviation will have beneficial impact on HABs
  - Deviation could have negative impacts on water quality, fish and wildlife
  - Deviation will cause adverse impacts to public health, safety, and welfare
  - Potential for increased coastal flooding
  - Potential for harm to MFL water bodies
  - Deviation requires preparation of an EIS
- City of West Palm Beach, Lake Worth DD, Palm Beach County, US Sugar, Nature Conservancy also submitted comments
- SFWMD 7/31/20 comments raise questions about ability to forecast future rainfall, reliance on water bank (net zero balance approach) and predictability of HABs
- **Corps approved the deviation October 8, announced on October 19**
- **Implementation could begin as early as February 2021**

#### **Center for Biological Diversity, et. al. v. U.S. Army Corps of Engineers, et.al.**

- Federal District Court lawsuit filed in 2019 challenging LORS 2008 2018 Biological Opinion and 2019 U.S. FWS consultation regarding Endangered Species Act
- Claim that HABs contribute to red algae, cause harm to endangered manatee
- Court held in partial summary judgment on 8/28/20 that 2019 determination by FWS that it was not necessary to hold formal consultation was improper because of new information showing that HABs “may affect” manatee as listed species, and reinitiation of formal consultation by FWS was necessary.
- Court directed Plaintiffs and USACE to confer on agreement regarding scope of consultation and scope of injunctive relief that Court will enter.
- On October 26, 2020 the Court entered a stipulated order that requires Corps to reinitiate formal consultation with FWS, prepare biological assessment of effects on listed species within 90 days, and complete consultation within one year.

#### **SFWMD EAA Reservoir Reservation**

- Rulemaking to establish water reservation for EAA Reservoir, the main storage feature for the Central Everglades Planning Project (CEPP) CERP component
- <https://www.sfwmd.gov/our-work/water-reservations>
- May 2020 Draft Peer Review Report
- **Rule Development Workshop held July 14, August 6. Public comment deadline by August 27, 2020.**
- **SEFLUC submitted comments after July 14 Workshop**
  - Questions regarding undetermined schedule for Lake Okeechobee and EAA Reservoir operations

- Questions regarding Savings Clause analysis
  - Questions regarding reevaluation of reservation
- Concern regarding interaction between Lake Okeechobee and EAA Reservoir and how EAA Reservoir operations relate to the function and operation of Lake Okeechobee
- Revised proposed rule language released by SFWMD on September 24
- Affected parties submitted request for hearing and lower cost regulatory alternatives
- On December 9, District staff released revised rule language that clarified that reservation rule would be readopted through rulemaking process before EAA Reservoir is deemed operational and that water available to existing legal users will not be diminished by the reservation
- Rule as revised was approved at adoption hearing held at December 10 Governing Board meeting
- SFWMD must file a Notice of Change and a SERC on the proposed rule 21 days prior to filing with the Department of State. Best guess is that rule will take effect at the end of January or beginning of February.

### **DEP Central Florida Water Initiative Rulemaking**

- 373.0465, Fla. Stat. requires DEP to adopt uniform rules for CFWI area, including a single definition of “harmful to the water resources” a single method for calculating per capita water use, a residential per capita goal for each CUP, and an annual conservation goal for each CUP
- DEP, SFWMD, SJRWMD, SWFWMD, rulemaking and proposed rule language on the following subjects:
  - Saline Water Intrusion
  - Annual Conservation Goals
  - Public Supply Demands
  - CII and Mining Demands
  - ERP/CUP Consistency
- DEP has released draft rule language that would significantly amend water use permitting requirements in CFWI:
  - Across the board 100 gpd gross per capita compliance limit for public suppliers using functional population and 115 gpd gross per capita compliance limit for public suppliers using permanent residential population
  - Immediate automatic reduction of all public supply permitted uses to the permittee’s demonstrated 2025 demand. Agriculture uses not affected. Commercial/Industrial/Mining uses limited existing allocation.
  - Elimination of the exemption of water used for food preparation or direct human consumption from the consideration of lower quality water sources.
  - Elimination of wetland mitigation option found in SFWMD’s rules.
- <https://floridadep.gov/water-policy/water-policy/content/office-water-policy-rulemaking>
- **Workshops held July 9, August 12 and September 30, 2020**

- **Comment deadline ended September 24, 2020**
- **A status update on the Draft Rule was presented to CFWI Steering Committee on October 28, 2020**
- **Notice of Proposed Rule published on November 19, 2020 and SERC distributed on same date**
- **SERC prepared by FDEP shows the rule will have to be ratified by the Legislature**
- **At least 7 lower cost regulatory alternatives were submitted prior to the December 10 deadline by affected persons.**
- **Public hearing was held by FDEP on December 11 and hearing was extended to December 18 to receive additional public comments**
- **FDEP will have to prepare a revised SERC**

### **U.S. EPA Lead and Copper Rule Revision**

- EPA published proposed revisions to the Lead and Copper Rule (LCR) on November 13.
  - Significant changes to existing LCR Rule including:
    - Maintains lead action level at 15 ppb but creates trigger level of 10 ppb that trigger additional planning, monitoring, and treatment requirements
      - Required actions depend on size of community water system, status of use of Corrosion Control Treatment, and existence of Lead Service Lines (LSL)
    - Prioritizes sampling of sites served by LSLs
    - All water systems with LSLs required to prepare plan for an LSL replacement program if lead trigger or action level is exceeded, including notification of consumers
    - All water systems must conduct targeted sampling and education at schools and childcare facilities they serve
    - When an individual sample exceeds 15 ppb, water systems are required to “find and fix” the sites, provide information to consumers, evaluate cause of elevated lead level
    - Additional reporting requirements to and from primacy agency
- SEFLUC comments submitted. Numerous comments submitted nationwide.
- **Final rule expected at any time**

### **SB 712 (Ch. 2020-150 Laws of Florida) Rulemaking Requirements**

- By December 31, 2020, DEP to initiate rule revisions based on recommendations of Potable Reuse Commission implementation framework report. Must address

contaminants of emerging concern and meet drinking water and other water quality standards.

- **DEP has announced two phases of rulemaking**
  - **Phase I – update 62-610 to be consistent with existing regulations and clarify existing language**
  - **Phase II – revisions adopting recommendations of Potable Reuse Commission**
- **Workshop held on October 23, 2020**
- **Rule development workshop scheduled for January 14, 2021**
- **By January 1, 2021, DEP and WMDs initiate rulemaking to update stormwater design and operations regulations, including updates to ERP Applicant’s Handbook. Must consider low impact design BMPs, measures for net improvement performance.**
  - **Introductory workshops held July 30, August 24 2020**
  - <https://floridadep.gov/water/water/content/water-resource-management-rules-development>
  - **First meeting of Stormwater Technical Advisory Committee on December 15, 2020**
  - <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/clean-waterways-act-stormwater>
- **By January 1, 2022, DEP shall complete rulemaking relating to location of OSTD systems and enhanced nutrient reducing designs, impaired or degraded water, domestic wastewater and drinking water infrastructure, potable water sources, stormwater infrastructure, TAC recommendations.**
- **DEP shall adopt rules for biosolids management consistent with law. Must be ratified by legislature.**
  - **DEP held rulemaking workshop September 18, 2020**
  - **Draft rule language incorporates biosolids provisions from Chapter 2020-150, revises monitoring and permitting criteria for land application and management of biosolids**
  - **Implements recommendations of Biosolids Technical Advisory Committee**
  - **Notice of Proposed Rule published on December 3, 2020**
  - <https://floridadep.gov/water/domestic-wastewater/content/dep-chapter-62-640-fac-rulemaking>
- **DEP shall adopt rules to reasonably limit, reduce, and eliminate domestic wastewater collection and transmission system pipe leakages and inflow and infiltration.**
- **DEP shall adopt rules to require public utilities to file annual reports and other data regarding costs and expenditures on pollution mitigation and prevention, including SSO,**

pipe leakages, inflow and infiltration. DEP shall adopt rules regarding inflow and infiltration studies and leakage surveys.

### **SFWMD Kissimmee River Reservation Rulemaking**

- SFWMD has reinitiated rulemaking to adopt a reservation for the Kissimmee River and associated waterbodies
- Draft reservation has drawn significant number of comments from south Florida interests due to potential impact on Lake Okeechobee and Everglades
- Most recent workshop held September 5
- SFWMD approved of notice of proposed rule at November 12, 2020 Governing Board
- <https://www.sfwmd.gov/our-work/water-reservations>
- Notice of proposed rule was published in Florida Administrative Register on November 20, 2020. Since no one requested a public hearing, the rule will become effective 21 days after it is filed with the Department of State.

### **Continuing to Monitor/No Update**

### **USACE LOSOM 2022 Regulation Schedule Background**

- In January 2019, the U.S. Army Corps of Engineers (USACE) announced that a series of National Environmental Policy Act (NEPA) public scoping meetings would be held
- In January 4, 2019 letter, Gov.-Elect DeSantis requested Pres. Trump to direct the U.S. Army Corps of Engineers commence public review of LORS to protect human health and safety, including “mitigating toxic water flows into the population of the Florida public, ensuring the necessary water quantity and quality for the greater Everglades region, and protecting the stability of the Herbert Hoover Dike.”
- On January 29, 2019 Gov. DeSantis announced that he supported reducing the lake level to about 10.5 feet, about 2 feet lower than the current 12.6 feet pre-wet season level currently implemented by the U.S. Army Corps of Engineers in the existing 2008 LORS
- **Public Scoping Meetings – SEFLUC Scoping Comments Submitted April 22, 2019.**  
Member utilities comments at public scoping meeting raise concerns about change in regulation schedule:
  - Need to provide safe, reliable water services to 6.5 million customers
  - CERP and WSE are foundation for current water use permits and SFWMD regulations
  - LORS08 was intended as interim measure and WSE regulation schedule was to be restored after dike repairs
  - Even more onerous regulatory schedule may jeopardize meeting permit and rule requirements, dependable water supply
  - Base condition for reevaluation should recognize reliance of existing programs on WSE, 1 in 10 level of protection for public supply

- Any proposed changes should maintain current levels of public supply availability and reduce water shortage frequency, take into account cutbacks caused by LORS08
- Lower lake levels could exacerbate saltwater intrusion, change in scheduled should maintain necessary hydraulic head
- Evaluation should incorporate climactic impact variability on regional system
- **March 15, 2019 joint letter of concern submitted to USACE and SFWMD regarding current Lake operations**
- **December 2019 University of Florida Water Institute Report regarding LOSOM**
  - Concludes LOSOM 2022 can only result in incremental changes in the operation of the C&SF System as long as the ACOE adheres to the current philosophy of balancing water supply, flood control and environmental protection.
  - Concludes that the only way that LOSOM 2022 can substantively change the operation of the C&SF System would be to change current philosophy of balancing the various uses of the system so that one or more uses would be emphasized to the detriment of other uses.

### PFAS Standards

- Currently, the EPA has a **non-enforceable** health advisory level of 70 parts per trillion for Perfluorooctanoic acid (PFOA) and Per- and polyfluoroalkyl substances (PFAS) combined.
- **February 20, 2020**, EPA issued preliminary determination that it is proposing to regulate PFOA and PFOS under the SDWA. EPA proposes to establish MCLs for PFOS and PFOA in drinking water, proposes to place restrictions on imported goods with PFAS. Identifies six contaminants that are proposed not to be regulated: 1,1-dichloroethane, acetochlor, methyl bromide (bromomethane), metolachlor, nitrobenzene, and RDX.
  - This is the first stage of regulatory determination.
  - AWWA submitted comments recommending that additional analysis is required to develop appropriate health risk assessments, engage an expert panel to evaluate state of available PFAS health risk data.

### Waters of the United States Definition

- Proposed rule published 2/14/19, accepted comments through 4/15/19.
  - Proposed rule is significantly narrower than 2015 WOTUS Rule, more closely replicates case law with some exceptions
    - Abandons idea of significant nexus test
    - 1<sup>st</sup> category things that are WOTUS
    - 2<sup>nd</sup> category things that are not WOTUS
    - 3<sup>rd</sup> section definitions
      - Includes definition of what constitutes a cooling pond
    - Clarified what is considered prior converted crop land and abandonment.
- 1/23/2020 EPA and USACE finalized Navigable Waters Protection Rule to define “Waters of the United States”:

- The territorial seas and traditional navigable waters
- Perennial and intermittent tributaries
- Certain lakes, ponds and impoundments
- Wetlands adjacent to jurisdictional waters
- NOT WOTUS: features that only contain water in direct response to rainfall; groundwater; many ditches, including farm and roadside ditches; prior converted cropland; farm and stock watering ponds; and waste treatment systems.
- New WOTUS Rule took effect June 22, 2020
- One Colorado District Court has enjoined new rule taking effect in Colorado
- N.D. California District Court rejected request for nationwide injunction against new rule

### **U.S. Supreme Court: County of Maui, Hawaii v. Hawaii Wildlife Fund - Groundwater Regulation Under Clean Water Act**

- On April 23, 2020, the U.S. Supreme Court issued its opinion in *County of Maui, Hawaii v. Hawaii Wildlife Fund, et. al.* The closely watched case addresses the scope of the Clean Water Act (CWA), and whether and to what extent the CWA require a permit for pollutants discharged from a point source which are then conveyed to navigable waters through a nonpoint source, such as groundwater. In a 6-3 decision, the Court held that the CWA does require such pollutant discharges to groundwater to obtain a permit, when the discharge “is the functional equivalent of a direct discharge from the point source into navigable waters.”
- Court says time and distance are most important factors in evaluating if groundwater discharge is a functional equivalent of a direct discharge, but whether CWA applies will be a case by case determination at this point.

### **SFWMD Rulemaking Rule 40E-61**

- SFWMD required to revise rules regarding Lake Okeechobee watershed and new rules for St. Lucie and Caloosahatchee watersheds by 2016 Northern Everglades and Estuaries Protection Program (NEEPP) (373.4595 Fla. Stat.) amendments
- Implementation of adopted BMAPs through watershed protection plans (assessment and monitoring requirements)
- Proposed requirements for non-point source discharges to submit a Water Quality Monitoring Plan in lieu of implementing BMPs required by BMAPs.
- Has drawn significant comments and interest from south Florida interests due to potential impact on Lake Okeechobee and Everglades
- <https://www.sfwmd.gov/event/40e-61-rule-workshop>

### **Potable Reuse Commission**

- Final Potable Reuse Commission Report available
- <http://prc.watereuseflorida.com/>

## **Draft USACE RECOVER Lake Okeechobee Stage Envelope Performance Measure**

- Based on assessment for improving CERP's ability to restore ecosystem while providing for region's other water-related needs.
- Last updated in 2007 including a range of 12.5 to 15.5 feet.
- Proposes to modify to 12 to 15 feet state target.
- USACE accepting second round comment through May 28, followed by review by RECOVER committee for final approval.

## **DEP Contaminated Media Forum Meeting**

- **September 12, 2019 Meeting** – <https://floridadep.gov/waste/district-business-support/content/contaminated-media-forum>
  - The meeting presented developments in the assessment and cleanup of perfluoroalkyl substances (PFAS), with particular focus on perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS):
    - Provisional cleanup target levels for PFOA and PFOS in soil and groundwater
    - Development of surface water screening levels
    - Division of Waste Management PFOA/PFAS investigation efforts
    - Unregulated Contaminants Monitoring Rule (UCMR)
    - Certified Fire Training Facilities
    - Select Dry cleaning and State Cleanup Sites
    - Consideration of PFAS congeners other than PFOA and PFOS

## **DEP Triennial Water Quality Review**

- DEP has initiated triennial review of state surface water quality standards as required by Federal Clean Water Act.
- DEP kickoff workshop May 14, 2019 provided overview of changes under consideration
  - Ch. 62-4 – no planned changes
  - Ch. 62-302
    - Potential revisions to turbidity criterion for coral protection
    - Potential revision regarding EPA recommended Selenium criteria
    - Potential clarifications of numeric nutrient criteria implementation document
    - Potential revisions to impairment for DO due to natural conditions for SSAC
    - Adoption of maps showing Class II waters (shellfish propagation or harvesting)
  - Ch. 62-303 – Few changes anticipated
  - Ch. 62-304 – Streamlining and updating of TMDLs
- Draft Rule Revisions Available on website
- <https://floridadep.gov/dear/water-quality-standards/content/triennial-review-water-quality-standards>