



September 12, 2022

Via Email LakeOComments@usace.army.mil

Colonel James L. Booth
U.S. Army Corps of Engineers
Jacksonville District

Ms. Jessica Menichino
U.S. Army Corps of Engineers
701 San Marco Blvd
Jacksonville, FL 32207

Re: Southeast Florida Utility Council's Comments on LOSOM Environmental Impact Statement/Water Control Plan

Dear Colonel Booth,

The Southeast Florida Utility Council (SEFLUC) represents water and wastewater utilities throughout Southeast Florida who provide potable water to over 6 million Floridians and visitors to our great state. SEFLUC's mission is to provide a communications, networking, and support structure for member utilities to continue to provide superior-quality water supply and wastewater management services to its customers in a cost-effective manner. SEFLUC members rely on the proper operation of the Central and Southern Florida (C&SF) Project regional water system to provide the necessary water supply to our surface and ground water sources as well as to protect these sources by controlling saltwater intrusion. The proper operation of the regional system is paramount to our member's ability to meet potable water demand requirements of our growing population and sustain our vibrant economy. Lake Okeechobee is the liquid heart and an essential component of the regional water system, and the proper operation of the lakes is key to providing for and maintaining surface and ground water sources.

On July 26, 2022, the U.S. Army Corps of Engineers' (Corps) released its Draft Environmental Impact Statement/Water Control Plan (EIS/WCP) regarding the Lake Okeechobee System Operating Manual (LOSOM). SEFLUC members have been monitoring and participating in the Corps' LOSOM development process from the very beginning. One of the original

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authorized purposes of the Central and South Florida Project is the protection of surface and groundwater sources for public water supply. This authorized purpose is critical to our members and every citizen of southeast Florida. More specifically, it is important existing legal uses of water are maintained in a manner consistent with the previous legal assurances including water supply availability. SEFLUC submits the following comments to express significant ongoing concerns regarding the consequences of the proposed LOSOM for public water supply in Southeast Florida.

State Control of Water Management

The proposed LOSOM schedule effectively eliminates South Florida Water Management District (SFWMD) control over water supply decisions above the water shortage band. This is a drastic and significant change from all prior Lake operating schedules and represents a significant encroachment on the State's role in the management of water use. LOSOM should clearly state Florida has control over its water management decisions, well before a water shortage level is reached.

State control over water management is absolutely necessary to maintain existing water supplies authorized and regulated by the State. Though the Corps may control operation of the regional system for which Lake Okeechobee lies at the center, it is the State, through the SFWMD, which authorizes and regulates the use of water by the issuance of consumptive use permits (CUPs). All prior and existing Corps regulation schedules for Lake Okeechobee have acknowledged the State's sovereign authority to control its own water resources, including the current LORS 2008 schedule.

LORS 2008 was adopted as a temporary measure to allow for a lower operating schedule, enabling the Corps to make necessary repairs to the Herbert Hoover Dike. In fact, the predecessor to the LORS 2008 schedule, the Water Supply and Environment (WSE) Regulation Schedule, was explicitly adopted with the purpose of providing a 1 in 10-year level of drought protection to existing legal users. This level of service was achieved in part through the maintenance of a no regulatory discharge zone in which the State, through SFWMD, had the ability to make decisions regarding allocation of water for public supply and other water uses.

Currently, CUPs issued by SFWMD to our members provide for 1 in 10-year drought protection and are dependent on the operations of and the water made available through Lake Okeechobee and the regional system. While local basins may supply much of the permitted water during the wetter months of the year, operation of the regional system is vital during dry periods to maintain water levels within the regional system. This critical operation ensures water supplies are available and provides drought protections guaranteed through individual CUPs and other legal assurances of water supply availability, the hydraulic head necessary to prevent saltwater intrusion and ensures the operation of our vital water supply systems prevent harm to the regional system. The proper operation of the regional system also protects

the millions of rate payer dollars our members have invested in our water treatment processes, assets, and alternative water supplies necessary to provide essential drinking water.

In particular, the Draft WCP would establish a wide-ranging Zone D which varies seasonally between 16.85 and 10.5 feet. This band, by far the largest and most critical band for identifying and avoiding potential water shortages, fails to incorporate any regulatory discharge or beneficial use band above the water shortage management band. As a result, there is no opportunity for SFWMD to exercise any authority to assure that water supplies for public use, particularly the municipal and industrial uses that are explicit authorized purposes of the C&SF Project.

Section 7.5.13 of the WCP addresses water management with regard to water supply. This section acknowledges that SFWMD is the agency responsible for the allocation of consumptive use of water taken directly or indirectly from the Lake, but critically does not assure that the ultimate decision-making authority regarding Lake operations remain with SFWMD, particularly within Zone D above the water shortage band. Instead, this provision merely provides that the Corps “intends to make releases that are consistent with SFWMD’s requests” but reiterates that Corps decision making regarding the timing and quantity of releases above the water shortage band will be “consistent with LOSOM,” i.e., Corps evaluations and decisions regarding potential water supply impacts, and that the Corps has no obligation to defer to SFWMD’s proposed Lake operations, even in circumstances when SFWMD asserts that beneficial uses of water will be adversely impacted by the operation decisions made by the Corps.

In addition to jeopardizing an authorized purpose of Lake operations, the current proposed WCP encroaches on the State’s authority to make water supply decisions. This shortcoming should be addressed in the EIS, and before LOSOM is finalized by assuring existing State control of water allocation is maintained under normal conditions, not just in times of water shortage.

The Preferred Alternative in the WCP Was Not Evaluated in the EIS

The Draft WCP would establish a wide-ranging Zone D which varies seasonally between 16.85 and 10.5 feet, with nothing more than narrative guidance or considerations for determining allowable releases at different lake stages and time of year. However, it is critical to note that the Preferred Alternative used in the draft WCP (Figure ES-5) is NOT the same as the LOSOM Preferred Alternative (PA25) which was modeled and used to document the performance results evaluated in the EIS. Zone D in the LOSOM PA25 (Figure 4.4) and evaluated in the EIS included several sub-zones, Zone D1, Zone D2 and Zone D3, each with established allowable releases. There is no analysis in the EIS of the wide-ranging, unconstrained Zone D utilized in the schedule incorporated in the Draft WCP.

Lack of Critical Definitions and Standards

As explained above, the Draft WCP would establish a wide-ranging Zone D which varies seasonally between 16.85 and 10.5 feet. Of particular concern, the WCP does not provide clear guidance as to when, for what length of time and how much water the Corps could release from the Lake, or which of the many potential criteria the Corps will actually rely on in making decisions. This deprives SEFLUC's members of the ability to reasonably account for these releases in their water supply planning. The WCP does not provide objective criteria that would allow a third party, including public water suppliers who rely on the CS&F Project either directly or indirectly to meet water supply needs, to predict what factors would ultimately be relied upon in making operational decisions in Zone D, and how those factors may be implemented in evolving real-world scenarios.

This lack of clear guidance makes it difficult, if not impossible to conduct a true evaluation of how the system will ultimately operate. Though we understand that the Corps wishes to afford itself additional flexibility to adapt operations in response to various factors identified in the WCP, this flexibility results in unpredictability regarding what actual water supplies will be available, and when.

This lack of predictability regarding actual operations has significant implications for the evaluations reflected in the draft EIS as well. Since the draft EIS's evaluation of alternatives, including the evaluation of the preferred alternative is premised on modeling when makes inherent, objective assumptions regarding the operations of the Lake, it does not provide sufficient assurances regarding actual real-world operations that will occur if LOSOM is adopted as currently proposed.

The implications of this lack of predictability are significant for water users, none more so than public suppliers. This is because public suppliers are obligated to protect the health, safety, and welfare of their customers and water users by conducting long term planning to assure that sufficient, reliable water suppliers will be available both now and in the future. Without the ability to reasonably assess what quantities of water will be available in the future from the C&SF Project, water suppliers are left in the untenable position of either experiencing more frequent and unacceptable water shortages or water unavailability or investing in costly alternative water supplies. The need for those alternative water suppliers, and the magnitude of alternative supplies that would need to be developed are inherently uncertain with regard to the proposed WCP, due to the lack of predictability in future operations.

Given the above, the WCP should be amended to provide sufficient predictability for water supply planning purposes, and the EIS should also be updated evaluate the true impacts of a more predictable operation schedule.

The Existing Conditions and No Action Alternative

The National Environmental Policy Act (NEPA) address the evaluation of environmental impacts of the selected alternative in comparison to other alternatives and existing conditions. The EIS describes the selection of the LORS 2008 schedule as the existing conditions and no action alternative. As explained above, LORS 2008 was a temporary Lake operation schedule that was put in place to allow for a lower operating schedule, enabling the Corps to make necessary repairs to the Herbert Hoover Dike. Due to lower operating levels, LORS 2008 resulted in a temporary reduction in the level of drought protection for existing legal users of water, including public supply. By contrast, the predecessor to the LORS 2008 schedule, the (WSE) Regulation Schedule, was explicitly adopted with the purpose of providing a 1 in 10-year level of drought protection to existing legal users.

The EIS confirms that LOSOM is intended to be operated within the overall framework and multi-purpose objectives of the C&SF Project, the Comprehensive Everglades Restoration Plan (CERP). In fact, the no action alternative evaluated in the EIS specifically takes into account a number of CERP projects in evaluating environmental effects. In particular, the Corps Programmatic Regulations require that the System Operating Manual integrate the operation of existing features of the C&SF Project with new projects authorized in CERP, so that the overall C&SF Project meets the goals and purposes of CERP. See 33 CFR §§ 385.28(a)(1),(b)(1). One of the purposes of CERP, as approved in the Water Resources Development Act of 2000 (WRDA) is to maintain existing legal sources of water would be maintained and SFWMD would continue to implement water supply planning and regulation as reflected in the WRDA 2000 Savings Clause (WRDA 2000, § 601 (h)(5)(A)).

WRDA 2000 Section 601(h)(5) provides in relevant part 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 shall not eliminate or transfer existing legal sources of water, including those for...an agricultural or urban water supply...” The plain language of the Savings Clause does not limit its application to only new CERP projects but to any activities implementing CERP that are part of the Project. On the contrary, WRDA 2000 Section 601(b)(1)(A) makes it clear CERP is a framework for all future modifications and operational changes to the Project.

Except as modified by this section, the Plan is approved as a **framework for modifications and operational changes to the Central and Southern Florida Control Project** that are needed to restore, preserve and protect the South Florida ecosystem **while providing for other water resulted needs of the region, including water supply and flood protection**. The Plan shall be implemented to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida

ecosystem and to achieve and maintain the benefits to the natural system and human environment described in the Plan, and required pursuant to this section, for as long as the project is authorized.

(Emphasis added).

Subsequent regulations implementing CERP confirm the scope of the Savings Clause. Section 601(h)(3) of WRDA 2000 requires the Corps to adopt programmatic regulations which “ensure that the goals and purposes of [CERP] are achieved.” In 2003, the Corps adopted those CERP programmatic regulations in 33 C.F.R. Part 385.

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Given the fact the Corps specifically intended the LORS operating schedule to be replaced by a regulation schedule subject to CERP, we respectfully submit it cannot be reasonably argued that LOSOM does not fall under the requirements of the programmatic regulations in 33 C.F.R. Part 385. In fact, in the LOSOM process itself, the Corps has explicitly stated the

LOSOM effort will take into consideration the Kissimmee River Restoration Project, as well as the CERP C-43 West Basin Storage Reservoir, the C-44 Reservoir and Stormwater Treatment Area, and the Central Everglades Planning Project (CEPP) South further confirming that LOSOM will in part implement CERP.

As explained above, the Programmatic Regulations further confirm the applicability of the Savings Clause to LOSOM. 33 C.F.R. 385.28(a)(6), provides Operating Manuals shall (i) be consistent with the goals and purposes of the Plan...[and] (vi) Be consistent with the reservation or allocation of water for the natural system **and the savings clause provisions** contained in the Project Implementation Report and the Project Cooperation Agreement and the provisions of Secs. 385.35(b), 385.36 and 385.37 and reflect the operational criteria used in the identification of the appropriate quantity, timing and distribution of water dedicated and managed for the natural system.” Therefore, in addition to the Savings Clause itself, the Corps has adopted its own regulations which make it clear the savings clause must be applied to the development of Operating Manuals.

Additionally, the NEPA process also requires the Corps take into consideration the requirements of State law. The Corps regulations provide the NEPA evaluation must consider “whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” 40 C.F.R. § 1508.27.

In this case, State law also contains a “savings clause” applicable to LOSOM similar to the Savings Clause of WRDA 2000. Section 373.1501(5)(d), Florida Statutes provides that as local sponsor, SFWMD shall “provide reasonable assurances 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...” Chapter 373, Florida Statutes establishes Florida’s legal framework for the permitting of consumptive uses of water. Under this system, the water management districts issue permits creating legal uses of water for specified durations and quantities. These permitted legal water uses are guaranteed protection by both the Savings Clause and Section 373.1501(5)(d), Florida Statutes. Failure to take into consideration the protection of existing legal uses of water in developing LOSOM 2022 therefore would violate both Federal and State requirements, contrary to the requirements of NEPA.

The failure to take into account the legal requirements regarding the Savings Clause has a direct impact on the EIS analysis, since the Draft EIS utilizes LORS 2008 as a baseline for its evaluation of the preferred alternative. As a result, the conclusion that LOSOM would have a nominal effect of the Lower East Coast Service Area water supply metrics is incorrect, because, among other reasons, it utilizes the wrong no action or baseline condition. It cannot be disputed that if the WSE schedule were utilized as a baseline for evaluation of LOSOM, it would result in a significant adverse impact on water availability for water supply, including SEFLUC’s membership.

Conclusion

In conclusion, the Proposed LOSOM EIS/WCP lacks the assurances necessary for public water supply sustainability, the evaluation of the impact to water supply is insufficient, and the proposed operating strategy is inconsistent with legal requirements regarding assurance of water supply availability and State control of water resources. Our members strongly believe the Corps must address these concerns and reevaluate and revise the proposed draft EIS/WCP to ensure the final Lake operating strategy protects the sustainability of our public water supply and future. Thank you for the opportunity to comment on this critically important issue.

Sincerely,



Ana T. Caveda, PE
Chair, Southeast Florida Utility Council

cc: SEFLUC Members