

**SEFLUC  
Regulatory Update  
May 8, 2023 Meeting**

**Updates**

**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.
- **January 19, 2021** EPA announced several PFAS actions:
  - Initiation of process to develop a national primary drinking water regulation for the two identified PFAS. EPA intends to fast track evaluation of PFAS for future drinking water regulatory determinations
  - Advanced notice of proposed rulemaking to get public comment and data on ongoing PFOA and PFOS evaluation, whether EPA should take additional steps, including whether PFAS chemicals should be subject to regulation as hazardous substances under CERCLA, and whether they should be subject to regulation as hazardous waste under RCRA. See <https://www.epa.gov/pfas/epa-actions-address-pfas>
  - Also announced additional PFAS data collection toxicity assessment for perflouorbutane sulfuric acid (PFBS), collection of data regarding presence and treatment of PFAS in wastewater discharges from manufacturing facilities.
- **July 13, 2021** EPA announced Draft Fifth Contaminant Candidate List (CCL 5)
  - Identifies PFAS as an entire class of contaminants that may require future regulation
- **October 18, 2021** – White House announced acts of eight federal agencies regarding PFAS
  - EPA Strategic Roadmap establishing timeframes to complete rulemaking and research for PFAS including
    - Expanded PFAS monitoring under fifth Unregulated Contaminant Monitoring Rule – Fall 2021
    - Enforceable limits on PFOA and PFOS in drinking water proposed by Fall 2022 and finalized by Fall 2023.

- New ambient water quality criteria for PFOA and PFOS including aquatic life and human health
  - Proposal to designate PFOA and PFOS as hazardous substances under CERCLA – Final Rule Summer 2023. Potential to require cleanup and cost recovery among responsible parties. Proposed rulemaking available for public comment in Spring 2022
- <https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024>
- **April 28, 2022** – EPA announces new interim measures, including use of NPDES program to address PFAS discharges
  - **EPA issued permits to publicly owned treatment works where EPA is the pretreatment control authority**
    - Permit conditions requiring industrial user inventory and BMPs to address PFAS discharges to POTWs
- **June 15, 2022** – EPA releases new drinking water health advisories for PFAS chemicals under the Safe Drinking Water Act. The advisories for PFOS and PFOA set in 2016 were lowered from 70 ppt to .02 ppt (PFOS) and 0.004 ppt (PFOA)—an over 99.9% reduction. The EPA also added new interim health advisories for two other types of PFAS: 10 ppt for GenX and 2,000 ppt for PFBS.
  - EPA acknowledges that these values are below “the level of both detection and quantitation. This means that it is possible for PFOA or PFOS to be present in drinking water at levels that exceed health advisories even if testing indicates no level of these chemicals.” The interim level for PFOS is 200 times lower than can be measured by current technology; it is 1,000 times below measurement limits for PFOA.
  - EPA: “The updated advisory levels, which are based on new science and consider lifetime exposure, indicate that some negative health effects may occur with concentrations of PFOA or PFOS in water that are near zero and below EPA’s ability to detect at this time.”
  - The EPA’s health advisories are “not to be construed as legally enforceable federal standards” but rather “describe information about health effects, analytical methodologies, and treatment technologies.”
- EPA expects to propose National Drinking Water Regulation for PFOA and PFOS in fall 2022, for adoption in 2023.
- **August 26, 2022** – EPA proposes to designate PFOA and PFOS as hazardous substances under CERCLA
  - Releases of PFOA or PFOS over 1 pound in 24 hour period would require reporting.
  - Wastewater treatment facilities are identified as a category of potentially affected entities in the proposed rule
  - Proposed rule published September 6, 2022 with comment due date of November 7, 2022. <https://www.regulations.gov/document/EPA-HQ-OLEM-2019-0341-0001>

- National Association of Clean Water Agencies, American Water Works Association, Association of Metropolitan Water Agencies and other groups have urged Congress to pass exemption from CERCLA liability for water and wastewater utilities
- **November 2, 2022** – EPA releases final CCL 5 with broadened definition of PFAS chemical class
  - CCL is a list of currently unregulated contaminants that may pose drinking water risks. The list is used to make future determinations about whether the contaminants should be regulated under national primary drinking water regulations.
- **November 25, 2022** – EPA releases Initial Regulatory Flexibility Analysis (IRFA) and Updated Economic Analysis following the completion of a Small Business Advocacy Review (SBAR) Panel for the Toxic Substances Control Act (TSCA) proposed rule for reporting and recordkeeping requirements. EPA has updated its estimate of costs for the proposed rule as proposed from approximately \$10.8M to \$875M in social costs.
- **December 5, 2022** - EPA proposed rule to eliminate de minimis exemption for reporting to Toxics Release Inventory by certain facilities.
- **December 6, 2022** – EPA issued update to recommendations to states and Publicly Owned Treatment Works (POTW) under existing NPDES permitting authority and through pretreatment and monitoring programs:
  - Update list of industrial users who may be potential sources of PFAS.
  - Monitor effluent, influent, and biosolids for PFAS and provide data on daily monitoring reports (DMRs).
  - Utilize BMPs to address PFAS discharges to POTWs.
  - Develop local limits for PFAS where appropriate.
  - Encourage industrial users to implement pollution prevention, product substitution and good housekeeping practices to reduce PFAS introduced to POTWs.
  - Reduce the amount of PFAS in biosolids
- **January 26, 2023 – Toxic Substances Control Act Proposed Rule**
  - New rule for PFAS in the TSCA inventory that have not been manufactured since 2006. Must notify EPA at least 90 days prior to manufacturing, at which point EPA can determine whether use presents an unreasonable risk of injury to health or environment.
- **March 14, 2023 – Safe Drinking Water Act - National Primary Drinking Water Regulation**
  - Proposed regulation establishing MCLs for 6 PFAS substances in drinking water
  - PFOA and PFOS MCL 4 ppt
  - Hazardous index calculation to limit mixture containing PFNA, PFHxS, PFBS, and/or GenX Chemicals
  - Plan to finalize regulation by end of 2023 with requirement that public water systems will be required to monitor for these chemicals, notify the public of PFAS levels, and reduce PFAS if levels exceed the proposed regulatory standards.

- EPA is also proposing health-based, non-enforceable Maximum Contaminant Level Goals (MCLGs) for the six PFAS. These levels represent the maximum level of a contaminant in drinking water where there are no known or anticipated negative health effects. The proposed MCLG for PFOA and PFOS is any amount above zero.
- [Virtual public hearing on May 4](#)
- Comments due by May 30
- **April 13, 2023 EPA Advanced Notice of Proposed Rulemaking – CERCLA**
  - Request for comments on whether EPA should designate certain PFAS, in addition to PFOA and PFOS, as hazardous substances under CERCLA – PFBS, PFHxS, PFNA, HFPO-DA, PFBA, PFHxA, PFDA, categories of PFAS
  - Comments due by June 12, 2023

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

#### **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>	Dec. 2021 – Jul. 2022
<b>Public Comment on LOSOM/EIS</b>	July -Sept. 2022
<b>Prepare Final LOSOM/EIS</b>	Oct. 2022 – Feb. 2023
<b>Final LOSOM/EIS</b>	Feb. 2023
<b>Signed Record of Decision</b>	Apr. 2023

- **Project Delivery Team Meetings:**
  - Using LORS 2008 as baseline
  - PDT and subteams evaluating balancing of plan purposes
  - Does not presume Savings Clause applies to analysis

- Development of five “balanced” lake schedules and development of balanced plans
- Preliminary preferred Alternative CC identified by Corps on July 19, 2021
- Final preferred alternative announced August 9, 2021
- Next step optimization of Alternative CC in Iteration 3 of evaluation process – now continuing through mid-November
- November 16, 2021 – Corps presents model run that is basis for final Preferred alternative and evaluation of Iteration 3 model optimization data
- **Concerns about evaluation of impacts on water supply and modeling**
- **Draft Operation Guidance/Water Control Plan released 3/7/22**
  - **USACE Operational Guidance Listening Session 3/21/22**
  - **“USACE intends to make releases that are consistent with the SFWMD’s requests and does not anticipate a conflict with federal project purposes in any zone of the schedule.”**
- **Issue of potential conflict with State of Florida’s authority to regulate water supply**
  - SEFLUC Comment Letter Submitted to USACE and SFWMD on 1/7/22
- **Current Concerns**
  - Extreme flexibility in draft operational guidance – lack of predictability
  - Evaluation of real-world impacts of outcomes under operational guidance
  - Impacts of operations on SFWMD MFLs
  - Deference to state water control/ Savings Clause
- **Draft EIS Released July 29, 2022**
- Numerous comments on draft EIS submitted September 12, 2022
  - SEFLUC Comment Letter
    - Importance of State control of operations above Water Shortage Management Zone
    - Proper evaluation of preferred alternative
    - Need for predictability and standards
    - Need for WRDA 2000 baseline
  - SFWMD Comment Letter
    - Need for language in Water Control Plan that specifically relies on SFWMD to guide decisions when entering the Water Shortage Management Zone
- USACE is evaluating and preparing responses to comments, potentially revising Plan
- USACE PDT Meeting on March 15, 2023
  - National Marine Fisheries Service requested transfer to formal consultation to address red tide analysis through Biological Opinion
  - July 2023 Final NMFS BO
  - October 2023 – NEPA public, agency, and tribe review of final EIS and System Operating Manual
  - December 2023 – Record of Decision
  - Will continue to operate under LORS 08

## **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 SFMWD 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.
- **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

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

- EPA published proposed revisions to the Lead and Copper Rule (LCR) on November 13, 2020.
  - 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
    - Initial LSL inventory completed within 3 years
    - 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
- LCR Rules took effect December 16, 2021 – Compliance deadline of October 16, 2024 for submittal of initial LSL inventory.
- EPA announced conclusion of its review and intent to develop additional rules, with objective of replacing 100% of LSLs referred to as Lead and Copper Rule Improvements (LCRI), with intended final action prior to October 16, 2024.
- On October 19, 2022, SEFLUC submitted a comment letter to FDEP regarding Florida-specific guidance regarding implementation of LCRR.
  - Supports FDEP adoption of the EPA’s Guidance for Developing and Maintaining a Service Line Inventory (EPA Guidance), released on August 4, 2022.
  - Encourages FDEP to adopt EPA Guidance language regarding Galvanized Requiring Replacement Material Classification.

- Recommends FDEP approval of the use of predictive modeling as method for potential service line investigations.
- Requests FDEP clarify that privately maintained water mains, such as large HOAs or universities, are the responsibility of the private system.
- Request to address the issue of the use of public funds with limitations/restrictions on the use of public funds for private side work.
- [EPA April 2023 7<sup>th</sup> Drinking Water Infrastructure Needs Survey Assessment](#)
  - Projection that Florida has 1,159,300 projected LSLs – more than any other state
  - [Drinking Water State Revolving Fund](#) funding of \$376,162,000 to Florida – \$254,788,000 of which will go toward lead pipe removal for 2023.

### **FDEP Clean Waterways Act Stormwater Rulemaking**

- Updated stormwater rulemaking pursuant to 2020 SB 712
- Finalization of rulemaking nearing completion
- Anticipated final workshop December 14, 2022
- Potential rule ratification by Legislature in 2023 session

### **SB 712 Rulemaking – New Wastewater Facility Reporting**

- 2020 SB 712 required FDEP to adopt rules regarding wastewater collection and facilities, and steps taken to address SSOs, infiltration, leaks.
- New Rule 62-600.700(4), F.A.C. requires annual reporting on expenditures on pollution mitigation and prevention among the utility’s permitted wastewater systems, including prevention of SSOs, collection and transmission leakages, inflow, and infiltration.
  - Rule provides that annual report shall be submitted “no later than June 30 of the year following the close of the fiscal year covered by the report”
- Question of when reporting requirement begins to apply.
- FDEP’s current interpretation is that the report is not required until after there is a condition added to the permit through modification or renewal that incorporates the reporting requirement.

### **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 held June 2, 2021**
- <https://floridadep.gov/water/domestic-wastewater/content/water-reuse-news-rulemaking-information>
- **Rule adoption Hearing 5/25/23**
- 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.
  - **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>
  - **Amendment because effective June 21, 2021 when ratification bill was approved**
- DEP shall adopt rules to reasonably limit, reduce, and eliminate domestic wastewater collection and transmission system pipe leakages and inflow and infiltration.
  - **Workshop to receive public comments on proposed amendment held March 19, 2021 – Chapter 62-600 F.A.C.**
  - **New requirements regarding maintaining collection systems to minimize infiltration, inflow, and leakage with requirement for corrective action**
  - **Requirement for emergency response plan including cyber security**
  - **Requirement to file annual reports on pollution mitigation and prevention, including SSOs and leakage**
  - **Power outage contingency plan requirements**
  - **Required development of pipe assessment, repair, and replacement action plans with five year planning horizon**
  - **Notice of Proposed Rule published on 9/16/21**
  - <https://floridadep.gov/water/water/content/water-resource-management-rules-development>

- 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.
  - **Workshop to receive public comments on proposed amendments held March 19, 2021 – Chapter 62-604, 62-620 F.A.C.**
  - **Notice of Proposed Rule published July 27, 2021 for Rule 62-620.610**
  - <https://floridadep.gov/water/water/content/water-resource-management-rules-development>

### **FDEP Outstanding Florida Springs Rulemaking**

- Required by 2016 amendments to Section 373.219, Fla. Stat. relating to Outstanding Florida Springs
- Adopting a uniform definition of term “harmful to the water resources” and uniform rules for issuing permits for groundwater withdrawals harmful to the water resources for Outstanding Florida Springs
- Implications for future definitions of “harm” in other contexts
- FDEP Workshop 3/21/22
- Several water suppliers submitted comments requesting clarification
- Numerous comments from environmental interests urging more restrictive rules

### **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. 62-302
  - Revisions of the marine and freshwater cadmium criteria;
  - New turbidity criterion to protect corals and hardbottom communities;
  - Revisions to the document titled Implementation of Numeric Nutrient Standards; and
  - Adoption of Type II site specific alternative criteria for dissolved oxygen for eight freshwater streams.
- Ch. 62-303 – Few changes anticipated
  - Revision of the trend assessment for nutrients;
  - Addition of language to incorporate portions of the document titled Implementation of Florida’s Numeric Nutrient Standards by reference;
  - Addition of language to assess the new turbidity criterion for the protection of corals and hardbottom communities; and
  - Addition of text to address evaluating the progress of restoration activities.
- Ch. 62-4 – Revision of Rule 62-4.242, F.A.C., language to address restoration and enhancement projects that occur within or near Outstanding Florida Waters.
- **Workshop held May 5, 2021**

- <https://floridadep.gov/dear/water-quality-standards/content/triennial-review-water-quality-standards>

### **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
- WRDA 2020 was incorporated into the year-end omnibus and COVID relief legislative package and was signed into law on December 27, 2020.

### **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**
- **On January 15, 2021, a coalition of 27 stakeholders submitted a letter to USACE expressing concern about current and proposed deviations from operation schedule.**
- Implementation began 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.

#### **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.