



March 1, 2013

VIA Email

CUPCON@dep.state.fl.us

**Re: Comments on CUPCon PWS Water Conservation Rule
Development**

To Whom It May Concern:

Please accept this letter on behalf of the Southeast Florida Utility Council (“SEFLUC”) regarding the Florida Department of Environmental Protection (“DEP”) and the five water management districts’ (“WMD”) February 12, 2013 Draft Consumptive Use Permitting Consistency (“CUPCon”) Water Conservation Proposal (hereafter referred to as the “Conservation Rule”) for public water suppliers (“PWS”). As you may be aware, SEFLUC is an unincorporated association composed of 35 water utilities located in the Upper and Lower East Coast of the South Florida Water Management District (“SFWMD”) within Miami-Dade, Broward, Palm Beach, Martin and Monroe Counties. SEFLUC’s member utilities supply approximately 805 million gallons per day of potable water to nearly five million citizens of the State of Florida. It is projected that by 2025 the member utilities will supply nearly one billion gallons per day of potable water to over six million Floridians.

SEFLUC has actively participated in past CUPCon workshops relating to the development for rule language in Chapter 62-40, Florida Administrative Code, and looks forward to continuing to participate in future workshops relating to this next phase of CUPCon rule development. We appreciate the DEP and WMDs hosting a workshop regarding the Conservation Rule portion of the CUPCon rule development on February 19, 2013. In addition to the comments raised during the workshop, we appreciate the DEP and WMDs consideration of the following written comments.

Statewide Rulemaking

SEFLUC members echo the concerns expressed at the February 19, 2013 meeting regarding the desire for the DEP and WMDs to move forward with rule adoption by individual WMDs instead of as part of a statewide rulemaking effort. In order to ensure consistency among the WMDs and the rulemaking process, this effort must remain at the statewide level.

Modification of Permits

40X-2.331 Modifications of Permits

There are a number of elements in this rule which pose concerns for SEFLUC.

1. Goal-Based versus Standard Conservation Plans

SEFLUC believes the permit extension should not be limited to only permittees implementing goal-based conservation plans. Few utilities have implemented goal-based conservation plans and therefore, the incentive program will be unavailable to most existing public water supply permits. This would leave the vast majority of public water supply permittees, who have collectively spent billions of dollars, over the past 10-20 years to significantly conserve water, unable to take advantage of this program. This policy also denies existing permittees with low per capita rates and effective conservation plans the ability to ever obtain an incentive extension, since it is unlikely they could achieve any additional meaningful conservation during the next permit iteration.

The rule needs to include language specifically addressing how existing permittees with successful conservation programs already in place can also obtain permit extensions. Since it will be much harder for an already low per capita permittee to achieve additional conservation, the expectations should not and cannot be the same. Permittees that already have an effective conservation program will have trouble demonstrating additional effectiveness when they have already reduced demand as much as possible. Instead, these permittees with successful conservation programs should receive the benefits of a permit extension by maintaining their success through approved conservation programs.

It should be noted that there is no functional difference between standard conservation and goal-based conservation plans with respect to conservation savings. Both plans involve the implementation of conservation measures to achieve water use efficiencies. A goal-based plan is not inherently more effective than a standard conservation plan. There is no requirement that a goal-based plan be more effective than a standard conservation plan.

In fact, the DEP stated that the goal-based plan can include the exact same measures as the standard conservation plan. Under this rationale, there is no basis for requiring utilities to convert to a goal-based conservation plan versus a standard plan or other permitted conservation plan. Public water suppliers should be required to provide evidence of conservation, regardless of the type of plan implemented. While a goal-based plan does contain interim and final conservation goals, a WMD is not bound by those goals. Under the proposed rule, water savings is determined objectively by the WMD based on actual empirical data.

Furthermore, all permittees essentially have a goal based program since they are required to identify the amount of water they intend to save year by year in Ten Year Water Supply Plans. Therefore, public water supply permittees already have goal based programs, whether or not that term is specifically used.

2. *Demonstrating Savings Attributable to Conservation*

Subsection (1)(c) requires the *“public water supply permittee must demonstrate that water savings were achieved through conservation or the use of reclaimed water that offsets potable water use, and not as a result of demographic or economic changes, or significant end user changes unrelated to conservation.”*

This language should be amended so the burden is not on the permittee to prove that the water savings are directly attributable to conservation or the use of reclaimed water that offsets potable water and not some other factors. In many circumstances, the effects of conservation cannot be directly measured and categorized as a direct public water supplier conservation effort. Along with a retrofit program that may result in quantifiable savings, an effective conservation program is a combination of ordinances and enforcement, public outreach, education, promoting low use appliances, and similar efforts which cannot be directly measured. These indirect savings need to be considered for purposes of determining whether a permittee is eligible for a permit extension. If there is a reduction in demand and conservation is implicated as one of the causes of that reduction, then the public water supplier should be allowed to take advantage of the entire reduction.

In essence, as long as there is an increase in efficiency that is clearly or arguably based on conservation, the permittee should be entitled to consider all of the savings as attributable to water conservation because ultimately the risk is on the utility to operate under the permitted allocation. WMD staff should have the opportunity to refute this assumption with evidence of demographic or economic changes, or significant end user changes unrelated to conservation. Only when the change in demand is clearly not due to conservation should the unaccounted for

reduction not be attributed to conservation for purposes of determining the permit extension.

3. *Calculating Savings*

Section 40X-2.331(1) provides the “*duration of the permit extension shall be based on the amount of water that was saved through conservation measures.*”

Subsection 1(d) further provides the “*specific duration of the extension will be calculated based on demonstrated demand for the saved water determined at the time of the extension request. To receive an extension incentive, the permittee must demonstrate qualification for at least a one year extension.*”

This language does not clearly address how much water has to be shown to be conserved over what period of time and how the “savings” are proportioned through the new term of the permit extension. During the workshop, the DEP indicated that the savings to meet the one year demand means the water saved is equal to incremental growth needs. However, this intent is not clear from the language proposed in the draft rule. Furthermore, if this is the intent of the DEP, the language should further address how the incremental growth needs will be determined, such as by the current population demand or projected incremental demand. Therefore, SEFLUC requests this language be amended to specifically address how permittees will calculate and demonstrate demand savings for incremental growth needs.

4. *Demonstrating the Need for Conserved Water*

Under the proposed rule, a permittee shall only be eligible for a permit extension incentive if there “is a demonstrated need for the conserved water to meet projected demand for the duration of the extension incentive.” This requirement creates a disincentive for investing in a conservation program if the permittee may still end up losing an allocation because it cannot demonstrate need within the terms of the permit extension or if obtaining the extension is questionable. The purpose of this rule is to encourage and incentivize reduced demand in traditional water supplies by conserving water. However, the requirement flies in the face of that purpose because if permittees can no longer demonstrate the need for the allocation as a result of these successful conservation efforts, they will not be eligible for a permit extension even if that permittee does not need an increase in allocation. Therefore, this language should be stricken from the rule.

5. Opportunity for Multiple Permit Extensions

The water conservation permit extension option should not be limited to a one-time event. There is no harm in allowing multiple extensions as long as the extension period is limited to water savings achieved through conservation. Encouraging public water supply permittees to operate as long as possible under their current permitted allocations benefits the water resource by reducing the need for new water withdrawals. Rather than limiting the water conservation program to a one time extension, the DEP/WMD may wish to limit the extended permit duration. For example, the rule could be re-written to allow multiple permit extensions so long as cumulative extension period does not exceed 20 years. By including a limit to the extended permit duration, the permittee will still be required to complete a full permit renewal at the expiration of the extended permit duration. In the meantime, the water that is not being used under its existing allocation will remain in the natural system for the benefit of the environment.

6. Consistency with adopted minimum flows and level recovery or prevention strategy and any adopted reservation of water

Subsection (1)(f) requires the “*extension must be consistent with any applicable adopted minimum flow and level recovery or prevention strategy and any adopted reservation of water.*”

The original permit would not have been issued if it was inconsistent with the adopted MFLs and reservations. Compliance with adopted MFLs and reservations, as well as prevention of environmental harm and interference with existing legal uses of water is ensured through permit conditions. If this reference is intended to apply to new MFLs and reservations that were not in effect at the time the permit was initially granted, then there is no reason to single out MFLs and reservations for special treatment. If changed circumstances occur, WMDs have authority under 373.243, Florida Statutes to revoke a permit in whole or in part. This means the WMD could require the retroactive application of new standards if harm to the resource is sufficient to justify such an extraordinary action. Therefore, this language is not necessary for inclusion in the rule.

7. Implementation Mechanism

The proposed rule should also clarify what mechanism will be used to implement the permit extension. Permittees should not be placed in a situation where their permits are “opened up” for challenges as a result of their request for permit extension. During the February 19 stakeholder meeting, the DEP indicated a letter modification would be an appropriate method for issuing the permit extension. The proposed rule should specifically state that the permit extension

will be issued as part of a letter modification and that issuance of a permit extension does not open up a permit for challenges by third parties.

Water Conservation Requirements

2.3.2.x Public Water Supply

2.3.2.x.x Water Conservation Requirements

1. Compliance With Per Capita Requirements

The first sentence in this section provides “*In addition to per capita requirements described in Section XXXX and any required conservation measures pursuant to an applicable adopted minimum flow and level recovery or prevention strategy, all public water supply Applicants shall implement either a goal-based water conservation plan described in Section 2.3.2.x.x.A or a goal-based conservation plan described in Section 2.3.2.x.x.B.*”

It is unclear from this language what “per capita requirements described in Section XXXX” is referring to. While some WMDs may have implemented district-wide per capita requirements, there are no per capita requirements in South Florida Water Management District. Because Section XXXX is not part of this rule proposal, SEFLUC cannot provide specific comments regarding this language. The proposed rule should be amended to describe exactly what per capita requirements are being referred to, whether state-wide, regional, or utility specific requirements that are part of a conservation plan.

2. Periodic Review

A. Standard Water Conservation Plan

The last sentence states “To ensure efficient water use, the standard water conservation plan shall be subject to periodic review during the term of the permit.”

B. Goal-Based Water Conservation Plan

The last paragraph states, “...the conservation measures in the goal-based plan shall be subject to periodic review over the term of the permit in accordance with the schedule and interim goals in the plan and, if the plan fails to meet the water conservation goal(s), including interim goals, the Permittee shall revise the plan to address the deficiency or implement a standard conservation plan....”

The DEP stated that the purpose of this language was not to allow a WMD to periodically re-open the permit and adjust the permitted allocation. Instead, the

language is intended to allow the WMD to periodically re-open the permit to adjust the conservation plan.

If this is the case, then the language should be modified to be consistent with DEP's March 23, 2012 Guidance Memorandum for Consumptive Use Permit Compliance Reporting Requirements and Review. This memorandum contains a section titled "Water Savings," which provides in pertinent part as follows:

The Department recognizes that effective water conservation is critical to sustaining our water supplies, meeting future needs and reducing impacts on our fragile natural systems. Progress toward this important goal can be unintentionally frustrated during the compliance reporting process when permitted allocations are reduced because of the decline in projected water demand due to conservation measures. This practice may have the unintended effect of penalizing permittees for the successful implementation of conservation measures, and rewarding permittees for the wasteful use of water by keeping their permitted allocations intact.

Therefore, **the Districts** shall continue to condition consumptive use permits on the implementation of water conservation measures and **may require periodic updates to the water conservation plan, if provided for in the permit conditions, to achieve the required targets or incorporate best management practices. However, the Districts shall not use the 10-year compliance report or similar periodic report required by permit condition to reconsider the permittee's allocation for water based on demand reductions resulting from successful water conservation.** Doing so removes the incentive for permit holders to pursue necessary water conservation measures.

(Emphasis Added). Including this language in the proposed rules makes it clear that the periodic review of the water conservation plan does not open the door to changing the permitted allocation.

Finally, the rules should define what constitutes periodic review. During the February 19 meeting, DEP and WMDs indicated that the reviews would be held on a case by case basis and/or tied to the implementation plan for either a standard or goal-based plan. However, it is still unclear how frequently the periodic review will occur, whether annually, every 5 years, or every 10 years as part of the 10 year compliance review. Under the proposed rules, if a standard conservation plan is not eligible for a permit extension, then review should be limited to the 10 year

compliance review. Only those permits which are eligible for permit extensions should be subject to more frequent periodic reviews.

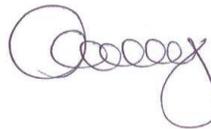
3. Goal-Based Conservation Plan

In Section 3.2.2.x.x.B – Goal-Based Water Conservation Plan, the last sentence of the second paragraph states, “*Permittees that demonstrate successful implementation of the goal-based plan may be eligible to extend the duration of their permit subject to 40X-2.331, Modification of Permits.*”

The quoted language is unnecessary. If a goal-based conservation plan is successful, then the permittee will have water conservation savings it can use to justify a permit extension of 1-10 years. If it is unsuccessful, the permittee will not have any water conservation savings to show for its effort. As written, a WMD could reject a permit extension on the basis the goal-based plan was not successfully implemented, even though water savings sufficient to justify a permit extension may have been realized. This provision should be written to drop any reference to successful implementation of the goal-based plan so that it just states, “Permittees may be eligible to extend the duration of the permit subject to 40X-2.331, Modification of Permits.”

On behalf of SEFLUC, I would like to thank the DEP and WMDs for their continued efforts to draft a mutually acceptable conservation rule as part of the ongoing CUPCon rule development process. We look forward to continuing to participate in future rule development workshops. Please do not hesitate to contact me if you have any questions regarding the comments herein.

Sincerely,

A handwritten signature in blue ink, appearing to read "Anne Murray". The signature is fluid and cursive, with a large initial "A" and a long, sweeping tail.

Anne Murray, Chair
Southeast Florida Utility Council

cc: SEFLUC Membership
Edward P. de la Parte